Supreme Court, U.S.
FILED

951202 DEC 27 1995

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

IEZHJA HARTSELL, A Minor,
By Next Friend, JERRY UPTON

Petitioner,

versus

FORT SANDERS REGIONAL
MEDICAL CENTER and
DR. RICHARD O. MANNING

Respondents.

On Petition For Writ Of Certiorari To
The Court Of Appeals Of Tennessee, Eastern Section

PETITION FOR WRIT OF CERTIORARI

MICHAEL H. MEARES
Counsel of Record for Petitioner
Dungan & Meares
Post Office Box 5023
Maryville, TN 37802-5023
(423) 977-0632

60 pp

Does the Fourteenth Amendment to the United States Constitution guarantee due process and equal protection of the laws to a 1 lb. 6 oz. baby born in the United States on September 28, 1983 whose doctor believes she is a nonviable fetus?

Did the Court of Appeals of Tennessee, Eastern Section, deny Petitioner Due Process and Equal Protection of the laws by limiting her causes of action to medical malpractice?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

GROUNDS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS ... 2

STATEMENT OF THE CASE 4

ARGUMENT 9

THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION, ERRED IN DENYING PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY LIMITING HER CAUSES OF ACTION TO MEDICAL MALPRACTICE. 9

A. A 1 lb. 6 oz. baby born in the United States on September 28, 1983 is entitled to the due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. 9

B. The State of Tennessee through its courts has deprived Iezjha Hartsell of due process and the equal protection of the laws. 13

C. Judicial actions which enable invidious discrimination by private citizens are prohibited by the United States Constitution. 18

D. The judicial actions denying Petitioner due process and the equal protection of the laws should be overruled and Petitioner restored to the rights of other citizens. 22

APPENDIX 1a

I. COURT ORDERS AND OPINIONS

Order of the Supreme Court of Tennessee entered August 28, 1995 denying the Petitioner's application for permission to appeal 1a

Order and Opinion of the Court of Appeals of Tennessee, Eastern Section, entered April 21, 1995 . . . . . 2a

II. OTHER ESSENTIAL MATERIALS

Fort Sanders Regional Medical Center Records

Admission Assessment and Notes 18a

Progress Notes 20a

Baby Chart 21a

Anesthesia Note 23a

East Tennessee Children's Hospital Records

History and Physical Examination by Dr. Stephen Prinz 25a

TABLE OF AUTHORITIES

CASES:

Cady v. Fraser,
122 Colo. 252, 222 P.2d 422 at 424 (1950) 15

Cardwell v. Bechtol,
724 S.W.2d 739 (Tenn. 1987) 14, 15

Chambers v. Baltimore & Ohio Railroad Co.,
207 U.S. 142 (1907) 13

Cruzan v. Missouri Department of Health,
497 U.S. 261 (1990) 15

Dartmouth College v. Woodward,
17 U.S. 518 (1819) 14

Fiske v. Kansas,
274 U.S. 380 (1927) 1

Interstate Circuit, Inc. v. Dallas,
390 U.S. 676 (1968) 1

Jones' Heirs v. Perry,
18 Tenn. 59 (1836) 12

Lanford v. York
457 S.W.2d 525 (Tenn. 1970) 15

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 21

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) (Speech) 21

Planned Parenthood of Southeastern Pennsylvania v. Casey,
112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 12, 23

Planned Parenthood of Central Missouri v. Danforth,
428 U.S. 52 (1976) 9, 10, 11, 14, 18, 21

Potashnick v. Port City Const. Co.,
609 F.2d 1101 (5th Cir. 1980) (right to counsel) 21

Ray v. Scheibert,
484 S.W.2d 63 (Tenn.App. 1972), *cert. denied* 15

Roe v. Wade,
410 U.S. 113 (1973) 8, 11, 16

Scott v. Sandford,
60 U.S. (19 How.) 393 (1857). 9, 12

Shelley v. Kraemer,
334 U.S. 1 (1948) 18, 21

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976) 22

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 11

STATUTES:

Tenn. Code Ann. § 29-26-115 10

Tenn. Code Ann. § 39-4-206
(now 39-15-206) 2, 3, 7, 8, 14, 16, 17

28 U.S.C. § 1257 1

OTHER AUTHORITIES:

Black's Law Dictionary, 6th ed. 17

H.R. 1833, 104th Cong., 1st Sess. (1995) 22

U.S. Const. amend. V 21

U.S. Const. amend. XIV, § 1 . . . . iii, iv, 1, 2, 9, 10, 11, 12, 14, 18, 19, 21, 23

GROUNDS FOR JURISDICTION

Under 28 U.S.C. § 1257 the United States Supreme Court is authorized to review by Writ of Certiorari final Judgments or decrees rendered by the highest court of a State "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution... ." The decision of an intermediate state appellate court has been held to be the highest court of a state for purposes of certiorari to the United States Supreme Court where the highest court denied discretionary review. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968). On August 28, 1995 the Supreme Court of Tennessee filed its Order denying Petitioner's Application for Permission to Appeal the April 21, 1995 Order of the Tennessee Court of Appeals, Eastern Section, which affirmed the Judgment of the Trial Court.

Petitioner here claims that she was denied an opportunity to litigate her common law claim against defendants for battery in violation of due process and was denied the equal protection of the laws by the State Courts' failure to apply a Tennessee Statute designed to protect her. The failure of the Tennessee Courts to allow petitioner's civil remedies under either common or statutory law violated the Fourteenth Amendment to the Constitution of the United States. Fiske v. Kansas, 274 U.S. 380 (1927).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1

"(a) The rights to medical treatment of an infant prematurely born alive in the course of an abortion are the same as the rights of an infant of similar medical status prematurely born spontaneously. Any person who performs or induces an abortion of such an infant shall exercise that degree of professional skill, care, and diligence in accordance with good medical practice necessary to preserve the life and health of such infant prematurely born alive in the course of an abortion, except that if it can be determined, through amniocentesis or medical observation, that the fetus is severely malformed, the use of extraneous life support measures need not be attempted.

(b) Any person who violates this section is guilty of a Class E felony.

(c) No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant during the course of a lawful abortion, whether such fetus or infant is quick or not,

so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care under the circumstances in the general vicinity in which they practice."

Tennessee Code Annotated § 39-4-206 (now § 39-15-206)

STATEMENT OF THE CASE

INTRODUCTION:

This is an application for certiorari by a twelve-year-old petitioner, Iezhja (pronounced "eye'-zhuh") Hartsell, from a denial of an Application for Permission to Appeal to the Supreme Court of Tennessee and an adverse Judgment of the Court of Appeals of Tennessee, Eastern Section. The minor applicant is referred to as "Petitioner," "Plaintiff," "Appellant," "Iezhja," or the "baby." The Defendants/Appellees are Fort Sanders Regional Medical Center, which is referred to throughout as the "Hospital" and Dr. Richard O. Manning, who is referred to either by name or more frequently as the "Doctor."

References to the abridged transcript in the Court of Appeals of Tennessee are made by the designation A.T., volume and page number. References to the technical record are made by the designation R., volume and page number. An Appendix follows containing the Order of the Tennessee Supreme Court, the Order and Opinion of the Tennessee Court of Appeals, Eastern Section, and eight pages of the medical records of Petitioner (Exhibit #2, A.T. I, 11 and Exhibit #12, A.T. I, 100) and is referred to by the designation App. and page number.

FACTS:

On September 28, 1983 at or about 7:24 a.m., Iezhja Hartsell was born at Fort Sanders Regional Medical Center in Knoxville, Tennessee. App. 18a. Prior to her delivery, Dr. Richard Manning, her mother's obstetrician, injected the narcotic

Demerol into her mother's bloodstream. A.T. I, 28. In doing so, he knew it would make it more difficult for the baby to breathe when born. A.T. I, 34; A.T. I, 80; and App. 23a. When the baby was delivered in the labor room, the doctor was in the bathroom. A.T. I, 40. Iezhja was a tiny baby weighing only 1 lb., 5-3/4 oz. App. 18a. Linda Hults and Michael Tinker, a nurse and a nurse anesthetist, took Iezhja to the delivery room and began pumping oxygen to her lungs through a tube in her throat. App. 23a; A.T. III, 311. Upon emerging from the bathroom and discovering what the nurses were doing, the Doctor, without making a physical examination of the child, ordered the removal of her breathing tube, or "extubation." A.T. I, 41; App. 23a.

For nearly an hour, the Defendants waited for Iezhja to die. App. 23a-24a. Iezhja was not taken to the Premature Nursery. App. 23a. She was not given the available drug Neonarcan to counteract the effects of the Demerol she had received via her mother's bloodstream. *See* App. 23a; A.T. I, 192-93. An available neonatologist, a specialist in treating tiny babies, was not called. App. 21a, Admission Comments; A.T. I, 44. No one was asked to give consent on behalf of Iezhja to the abandonment of her care. A.T. I, 44-45. Neither the Doctor, the nurse, the nurse anesthetist, nor any member of the Hospital staff did anything to get much needed oxygen into the newborn baby. A.T. III, 313. While waiting for Iezhja to die, the experienced Nurse Hults instructed a new nurse, Jane Lanham, on the procedure followed at the Hospital for weighing and tagging babies from whom life support had been withdrawn. A.T. III, 311-312. After nearly an hour, when Iezhja had not died as anticipated (A.T. I, 44), she was finally taken to the Premature Nursery (App. 18a). She was gasping for air, and the skin on her chest was retracting between her ribs. *See* App. 18a, 20a; A.T. I, 61-62. Her body temperature was too low to

register on the thermometer. App. 18a. She was crying and her pulse was racing. The 8:30 a.m. Admission Note at the Hospital's Premature Nursery describes Iezhja's condition following the Hospital's procedures: "Rectal Temperature--unable to register on IVAC;"[1] "Apical Pulse--140;" "Respirations--40--gasping;" "Retracting--severe;"[2] "Crying." App. 18a. She was then reintubated to provide her with oxygen and quickly transported to East Tennessee Children's Hospital by Dr. Stephen Prinz. App. 25a-26a.

In addition to the injury, pain and suffering Plaintiff endured for the hour she struggled to breathe without Defendants' assistance, the minor Plaintiff has suffered a loss of hearing and accompanying speech problems due to the destruction from lack of oxygen of the sensitive nerve cells of the inner ear. A.T. II, 136, 141-42; A.T. II, 153; A.T. II, 245. In most other respects, the minor Petitioner is a normal, healthy child. A.T. I, 14-23; A.T. III, 318.

PROCEDURAL HISTORY:

On April 7, 1989, Petitioner filed her Complaint in the Circuit Court of Knox County, Tennessee, against the Hospital and the Doctor and certain nurses in attendance at her birth. R. I, 1.

---

[1] Defendants try to pretend that this was the result of an equipment malfunction, but Dr. Prinz records the child's temperature as being 94 degrees upon his arrival at Fort Sanders, raised to 96.9 degrees when he arrived back at East Tennessee Children's Hospital and raised eventually to 98.8 degrees. *See* Problem (5), Hypothermia, App. 28a.

[2] The Doctor explained that severe "retracting" means the baby's skin was sinking into her ribs when her chest expanded. A.T. I, 62, ll. 14-21.

The original Complaint alleged alternate theories of relief for medical malpractice and battery. On January 4, 1991, Plaintiff moved to amend her Complaint to state causes of action based upon the tort of outrageous conduct and upon a violation of Tenn. Code Ann. § 39-4-206. R. I, 73. Upon the motion of Defendants, the trial court dismissed Plaintiff's causes of action for outrageous conduct and violation of Tenn. Code Ann. § 39-4-206. R. II, 156. Subsequently, and *sua sponte*, the trial court offered to and dismissed Plaintiff's cause of action against Defendants alleging battery. A.T. I, 2-3; R. IV, 471-72.

The case came on for trial on March 2, 1993 upon the sole cause of action permitted by the trial court, medical malpractice. A.T. I, 4. The Defendant Doctor testified that the Defendant nurses were acting on his orders in withdrawing life support from the minor Plaintiff, and Plaintiff took a voluntary dismissal as to said nurses. A.T. I, 68. The trial court excluded proof offered by Plaintiff which it viewed as too prejudicial (A.T. I, 98) to the Defendants and further excluded proof Plaintiff offered to establish the standard of care at Defendant Hospital. A.T. II, 225-26. At the close of Plaintiff's proof, the trial court directed a verdict for Defendant Hospital. A.T. III, 319. At the close of Defendant's proof, the trial court refused Plaintiff's request to instruct the jury regarding the physician's duty not to abandon his patients. A.T. III, 366. Thereafter, the jury returned a verdict in favor of the sole remaining Defendant, the Doctor.

CONSTITUTIONAL ISSUES:

The denial of equal protection of the laws was raised first in argument in the trial court in opposition to the pretrial dismissal of plaintiff's statutory cause of action under Tenn. Code Ann. § 39-

4-206. In the Court of Appeals the plaintiff argued that the dismissal in the trial court of plaintiff's statutory cause of action under Tenn. Code Ann. § 39-4-206 in combination with the dismissal of her common law actions resulted in an impermissible extension of the United States Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973). Plaintiff conceded arguendo that the actions of the defendants in removing life support from the minor plaintiff were not malpractice. Nevertheless, appellant maintained that the Court action in limiting her cause of action to malpractice violated her constitutional rights. *See* footnote 2, p. 9 and p. 15 of Appellant's Brief on Appeal. The Opinion of the Court of Appeals of Tennessee, Eastern Section, did not address the Constitutional question (App. 3a-17a), and the Tennessee Supreme Court denied Petitioner's Application for Permission to Appeal (App. 1a).

ARGUMENT

THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION, ERRED IN DENYING THE PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY LIMITING HER CAUSES OF ACTION TO MEDICAL MALPRACTICE.

A. A 1 LB. 6 OZ. BABY BORN IN THE UNITED STATES ON SEPTEMBER 28, 1983 IS ENTITLED TO THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the infamous Dred Scott case, Chief Justice Taney found African-Americans to be "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority." Scott v. Sandford, 60 U.S. (19 How.) 393 at 404-405 (1857). Moreover, the Chief Justice held that they had "no rights which the white man was bound to respect." *Id.* at 407. The Fourteenth Amendment of the United States Constitution was ratified soon after the Dred Scott decision making all persons "born or naturalized in the United States" citizens entitled to "the privileges and immunities of citizens," "due process of law," and "the equal protection of the laws."

In this case the facts before the Court pose directly the question of whether the appellant is a citizen at the moment of her birth or whether her citizenship must first pass a test of "viability" that only her physician can administer. In Planned Parenthood of

Central Missouri v. Danforth, 428 U.S. 52 (1976), Justice Blackmun writing for the majority of the Supreme Court opined:

> "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."

Id. at 64.[3]

The judgment of the attending physician in this case was that the "[p]atient delivered a non viable fetus in labor room bed . . . ." App. 22a. Consistent with the Supreme Court's decision in Danforth, the Court of Appeals of Tennessee in this action has made doctors the sole arbiters of plaintiff's rights by limiting her causes of actions to that one arising under the Tennessee Medical Malpractice Review Board and Claims Act of 1975. Tenn. Code Ann. § 29-26-115(b).

If the testimony of expert doctors on the "standard of care," nowever, is the exclusive "law" applicable to life and death decisions for severely premature newborns, then the Fourteenth Amendment to the United States Constitution formulated to protect all citizens' right to life has lost its meaning. Defendants' expert at trial repeatedly testified that the standard of care for the minor Plaintiff in this case was to do nothing. He stated, "[W]e'll not do anything." A.T. III, 344, l. 4. "[O]ur process would be not to do anything." A.T. III, 346, l. 7. "[N]o efforts will be made for this baby." A.T. III, 347, l. 3. Moreover the expert explained the

---

[3]The Court found Section 6(1) of the Missouri Act unconstitutional because "[i]t does not specify that such care need be taken only after the state of viability has been reached." *Id.* at 83.

reason for the Do Nothing standard of care was that "these babies were considered nonviable for all practical purposes." A.T. III, 344, ll. 6-7.[4]

Petitioner here contends that the 1976 Supreme Court ruling in Planned Parenthood v. Danforth, striking down Section 6(1) of the Missouri Act, was an unconstitutional extension of the 1973 decision in Roe v. Wade. Moreover, Petitioner contends that the Tennessee Courts have denied her Fourteenth Amendment rights by falling prey to the same fallacy as did the Supreme Court in Danforth, to wit, making doctors the sole arbiters of severely premature infants' rights when those citizens in the judgment of their physicians are "nonviable." Put simply, how can the law of the land protect viable, unborn babies and yet the courts fail to protect viable, live born babies whether or not their doctors consider them "nonviable for all practical purposes?"[5]

The majority of this Court has now rejected "viability" as the touchstone for constitutional rights. Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Yet as recently as 1992, Justice Blackmun reminds us:

> No member of this Court--nor for that matter, the Solicitor General, . . . has ever questioned our holding in Roe that an abortion is not 'the termination of life entitled to Fourteenth

---

[4] Later in the expert's testimony it becomes apparent that one of the practicalities to which he is referring is "the immense cost society has to pay when the outcome is not good . . . ." *See* A.T. III, 362, ll.6-7.

[5]The language chosen by Defendants' expert mirrors the quality of life analysis of Roe, assessing "meaningful life outside the mother's womb." Roe v. Wade, *supra*.

> Amendment protection.' Accordingly, a State's interest in protecting fetal life is not grounded in the Constitution.

Planned Parenthood of Southeastern Pennsylvania v. Casey 112 S.Ct. 2791, 120 L.Ed.2d 674 at 751 (1992) (citations omitted).

The question, however, is not simply when fetal life becomes a "person born" within the meaning of the Fourteenth Amendment but more importantly who is empowered to determine when life is constitutionally entitled to protection.

It is unconstitutional for either the Tennessee Courts or indeed the United States Supreme Court to delegate to members of the medical profession the determination of which citizens are entitled to the Fourteenth Amendment protection. It is the duty of the state, by general laws, to protect and provide for those who are incapable of taking care of themselves. Jones' Heirs v. Perry, 18 Tenn. 59 (1836). Ordinarily, it is the judicial role to protect the rights of individual infants where a legislative act has been used to take those rights away. In this action, however, just as in the Dred Scott case, it is the Courts themselves which have taken away the rights of the individuals. Scott v. Sanford, *supra*. Only this Court can restore the Constitutional rights which have been taken away. As foretold in Jones' Heirs, the Court must protect the rights of an individual infant lost to the application of a law because the time may come "when the sanctuary of justice will be the last hope of the oppressed." *Supra*.

B. THE STATE OF TENNESSEE THROUGH ITS COURTS HAS DEPRIVED IEZJHA HARTSELL OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

Iezhja Hartsell, a citizen of the United States, has suffered discrimination at the hands of the judiciary of the State of Tennessee. She has lost her right to civil remedies guaranteed to every other citizen. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 at 148 (1907). The Tennessee Supreme Court has refused to hear Appellant's case, and the Court of Appeals of Tennessee, Eastern Section, has withheld her right to seek civil redress for common law and statutory violations by judicial sleight of hand.

In its opinion, the Court of Appeals of Tennessee disposed of Plaintiff's common law right to sue for battery stating:

> Since the Defendants were authorized to administer medical care, the extubation **was consensual**. We therefore find the Trial Court correctly concluded that the Plaintiff's cause of action was for medical malpractice, not battery.

App. 7a-8a.

Yet when it comes to the consideration of plaintiff's civil action under the Tennessee abortion statute,[6] the Court finds it to be inapplicable saying that "[t]he plaintiff does not contend that she was born as a result of a failed abortion." App. 9a. In fairness to the plaintiff, either the efforts to terminate her life were with her mother's consent or they were not. If she was being aborted she was entitled to the protection afforded her by the Tenn. Code Ann. § 39-4-206. If not, then the harmful touching of her was a nonconsensual common law battery for which cause, due process would allow a trial.

DUE PROCESS:

The Fourteenth Amendment to the United States Constitution guarantees every litigant in our judicial system certain minimum process of law. Daniel Webster in his argument in the Dartmouth College case described this "due process of law" as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Dartmouth College v. Woodward, 17 U.S. 518 at 581 (1819). There was no legal reason to deny plaintiff her common law action for battery in this cause as the Tennessee Courts have never found the theories of malpractice and battery to be inconsistent.

As explained in Cardwell v. Bechtol (724 S.W.2d 739, at 751 (Tenn. 1987)), "these theories, battery and malpractice, are not ordinarily inconsistent. . . ." "The one is based on lack of care or skill in the performance of services contracted for, and the other

---

[6]The relevant portions of the Tennessee Statute are similar but not identical to Section 6(1) of the Missouri Statute in Danforth.

one wrongful trespass on the person regardless of the skill or care employed." Lanford v. York, 457 S.W.2d 525 at 528 (Tenn. 1970) (quoting Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 at 424 (1950).

In Lanford v. York, *id.*, as in this case, Plaintiff brought two causes of action: one for malpractice and another for assault and battery. The trial court required an election by Plaintiff between the two. Plaintiff elected to try the malpractice action, and the jury returned a verdict for Defendant. Nevertheless, the Tennessee Supreme Court remanded that case for trial on the single issue of assault and battery. *Id.* at 529.

The extubation of Iezhja Hartsell was clearly a harmful, offensive and nonconsensual touching. "Without consent, the treatment constitutes a battery." Cardwell v. Bechtol, *supra* at 751.

> Thus, it will be seen that whenever a physician performs surgery upon a person, not being authorized by consent and not being protected by the exception made in cases of emergency, the physician is liable to such person for consequent injuries, regardless of whether such injuries resulted from negligence or otherwise.

Ray v. Scheibert, 484 S.W.2d 63, 71 (Tenn.App. 1972), *cert. denied.*

Instead of the Courts allowing a remedy for common law battery, the Tennessee Court of Appeals found that the mother had consented to the maltreatment of her baby and thus no action for battery could arise. Such a finding, however, runs contrary to the recent decisions of this Court disallowing the so-called "substituted judgment" theory. In Cruzan v. Missouri Department of Health,

497 U.S. 261 at 286 (1990), the Court concluded: "[W]e do not think that the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself." *Id.* at 286. Petitioner argues that the failure to provide her with necessary care to preserve her life removes any implied consent to touch her, ab initio. She herself seeks civil redress for battery but has not been heard in the Courts of her State in violation of her right to Due Process.

EQUAL PROTECTION:

In addition to the Court of Appeals denying plaintiff due process, it denied her the equal protection of the laws by refusing to carry out the intent of a Tennessee Statute specifically designed to protect her in the face of "consensual" acts aimed at her demise. In 1978 the Tennessee Legislature, in the wake of the Supreme Court's decision in Roe v. Wade, *supra*, exercised its authority to regulate the practice of medicine governing infants born alive in the course of an abortion. Tenn. Code Ann. § 39-4-206 sets out statutory minimum rights for infants prematurely born alive requiring physicians and other health care providers to "exercise . . . good medical practice necessary *to preserve* the life and health of such infant . . . (emphasis added)." The Act makes "any person in attendance . . . civilly responsible for providing all reasonable and necessary care . . . ." Tenn. Code Ann. § 39-4-206(c). While the Act does not specify what care is required "to preserve the life," it is transparent that the law requires more than the Do Nothing standard of care enunciated by Defendants' expert. Moreover, the Act itself sets out that it intends that the rights for unwanted newborns "shall be the same as the rights of an infant of

similar medical status prematurely born spontaneously." Tenn. Code Ann. § 39-4-206(a).

The Court of Appeals of Tennessee found the statute inapplicable noting that "Plaintiff does not contend that she was born as the result of a failed abortion." App. 9a. Yet, it is the Court and not Plaintiff that found that the Doctor's actions were "consensual." Moreover, Defendants' expert justifies the Defendants' actions by addressing Plaintiff's birth in terms of an abortion. Dr. Manning notes in Iezhja's Baby Chart in the Delivery Comments: "Patient delivered nonviable fetus." App. 22a. Defendants expert states that the minor Plaintiff is "nonviable for all practical purposes." A.T. III, 344, ll. 6-7. Even more persuasively, Defendants' expert says Plaintiff's birth was not "a process of delivery." A.T. III, 347, l. 22. The 6th Edition of Black's Law Dictionary defines "abortion" to include both the spontaneous and artificially induced expulsion of an embryo but explains that in a legal context, the term usually refers to an induced abortion. Given the finding of the Court of Appeals that the Defendants were acting with plaintiff's mother's consent, and Defendants' position that Plaintiff's birth was something short of a delivery, the application of this statute to protect her was both appropriate and required.

In passing Tenn. Code Ann. § 39-4-206, the Tennessee Legislature clearly stated that there was but one class of infant rights to medical care, yet the Legislature recognized two types of birthing processes: one attended by a physician retained to terminate the life and the other to preserve it. The ruling of the Court of Appeals of Tennessee stands the statute on end by impermissibly establishing two classes of infant rights to medical care: ones which can be enforced by civil action under the Tennessee abortion statute and the common law of battery and ones

which cannot. In violation of the Equal Protection Clause of the Fourteenth Amendment, the Court of Appeals of Tennessee has discriminated against Iezhja Hartsell by placing her in a class of infants who are not entitled to either the statutory or common law protection. The result achieved is identical to that which the United States Supreme Court achieved in overruling Section 6(1) of the Missouri statute in Danforth whereby only the physician can determine which class of infants is entitled to protection.

C. JUDICIAL ACTIONS WHICH ENABLE INVIDIOUS DISCRIMINATION BY PRIVATE CITIZENS ARE PROHIBITED BY THE UNITED STATES CONSTITUTION.

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelley v. Kraemer, 334 U.S. 1 at 13 (1948).

Nevertheless, when the States have made available to such private citizens the full coercive power of government to deny individuals their rights, then judicial action becomes state action offensive to the Fourteenth Amendment. *Id.* at 19. Petitioner contends that the Court of Appeals of Tennessee has impermissibly delegated the full judicial power of government to determine who is entitled to

Fourteenth Amendment protection to individual doctors who may or may not recognize the rights of newly born citizens.

In the instant action, the private conduct of which Petitioner complains is not an isolated occurrence. Indeed, Plaintiff proved that no procedure was in place to make sure consent would be obtained before withdrawing life support from a minor child who was unable to consent to such action. A.T. III, 286, ll. 9-18; A.T. III, 314. This was true in spite of the fact that the Hospital had been previously faced with similar decisions (A.T. III, 313, ll. 14-21); that the clinical coordinator knew life support was being withdrawn from babies without consent (A.T. III, p. 316, l. 20 - p. 317, l. 20).

The relevant procedure which Defendant Hospital had in place involved weighing and tagging babies while they were waiting for them to die. Fortuitously, the Hospital's procedure was uncovered because one nurse (Hults) happened to be teaching another nurse (Lanham) at the time of Iezhja's birth.

> Q. And [Dr. Manning] ordered you to stop [giving oxygen to Iezhja] and you did?
>
> A. He ordered us to stop and we did. Uh-huh.
>
> Q. And after you did, you got another nurse, a nurse Jane Lannum (phonetically), to come into the nursery with you, did you not?
>
> A. Yes, I did.

Q. And tell the jury what your relationship or what the relative position of you and Nurse Lannum was.

A. Jane Lannum was a new employee of the hospital, hired to work in labor and delivery. She had been up there approximately just a few weeks. And I was an RN that had worked there for some time, and I was her preceptor. She was to work with me and I was to show her and teach her about what we do in labor and delivery.

Q. And on this particular day you were showing her and teaching her what was done after a baby who was alive -- the decision was made by a physician no longer to provide them with oxygen; is that not true?

A. That's true.

Q. And the procedure that was done was to follow a procedure of taking the footprints of the baby and placing tags on the baby and generally weighing the baby, but not taking the baby to the nursery?

A. That is correct.

A.T. III, p. 311, l. 13 - p. 312, l. 17.

The intended result of defendants' procedure, and the nearly accomplished result in this case, is that the baby dies. Just as in analyzing the restrictive property covenants in Shelley v. Kraemer (*supra*), the mere fact that a procedure has been set up by private citizens to deprive individuals of their rights, standing alone, cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. In this case as in Shelley *(supra)*, however, the Courts have made available to the private citizens the power with which they may deny individuals their right to life. The rule enunciated in Planned Parenthood v. Danforth, *supra*, is that only the attending physician can judge when viability begins. The decision of the Court of Appeals of Tennessee is that only physicians and their standard of care can determine the right to receive or withdraw life saving care. Under those rulings, the existence of Defendants' standard procedure for terminating life absolves them of liability for wrongdoing and denies Petitioner both her right to life and to equal protection of the laws.

The fundamental right to life found in the Fifth and Fourteenth Amendments to the United States Constitution is entitled to protection by this Court when judicial actions are being employed to justify private discrimination of that right.[7] As long as Courts delegate the responsibility of protecting life to Doctors

---

[7] This Court has held in other cases that judicial actions which unfairly restrict fundamental freedoms constitute "state action" under the Fourteenth Amendment. See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (Association); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Speech); Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980) (right to counsel).

based upon their judgments about "meaningful life" and "viability for all practical purposes," then a whole class of citizens shall suffer the procedure meted out to Iezhja Hartsell in this case.

D. THE JUDICIAL ACTIONS DENYING APPELLANT DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS SHOULD BE OVERRULED AND PETITIONER RESTORED TO THE RIGHTS OF OTHER CITIZENS.

For the Court to act in this case would place all doctors and hospitals on notice that the first breath of life entitles the newly born citizen to "due process and equal protection of the laws."[8] To answer the question which this Court has posed in Simon v. Eastern Kentucky Welfare Rights Organization 426 U.S. 26 (1976) at 46, the removal of the limitations on liability regardless of the physician's judgment about the newborn's viability would force Doctors and Hospitals to act with more humanity, not more technology. Had Iezhja Hartsell been held and warmed, she would have no cause for battery, but to touch her offensively is anathema. This Court might realistically expect the Hospitals of this country to take immediate action to enact procedures which treat our newest citizens humanely without regard to their race, their mothers' preferences for their survival, and especially without regard to their doctor's unilateral judgments about the "meaningfulness" of their lives.

---

[8]The Court may soon confront similar questions in evaluating proposed congressional action outlawing "partial birth" abortions. H.R. 1833, 104th Cong., 1st Session (1995).

Justice O'Connor's Opinion in Planned Parenthood v. Casey begins with the words: "Liberty finds no refuge in a jurisprudence of doubt." *Supra*, L.Ed.2d at 693. In response, Iezjha Hartsell says the doctors have left me freezing, gasping for air and waiting on a table to die. When I lived in spite of them, the Courts left me to be judged by the same doctors who abandoned me and have denied me those rights afforded other citizens under the law. Justice Scalia ends his Opinion in Casey stating: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Id.* L.Ed.2d at 797. In response, Iezjha Hartsell states that it would work a grave injustice to her and others similarly situated if this Court leaves this area of the law without guaranteeing Fourteenth Amendment protection for each citizen born alive, no matter how small or insignificant their life may seem.

RESPECTFULLY SUBMITTED this 26th day of November, 1995.

DUNGAN & MEARES

By: _____

MICHAEL H. MEARES
Counsel of Record for Plaintiff
Post Office Box 5023
Maryville, TN 37802-5023
(423) 977-0632

APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

IEZHJA HARTSELL, b/n/f	)	FILED
	)	95 AUG 28 AM 10:07
Plaintiff-Appellant,	)	Appellate Court Clerk
	)	Knoxville
	)	
v.	)	Knox Circuit
	)	C.C.A. NO.
	)	03A01-9407-CV-00234
FORT SANDERS	)	
REGIONAL MEDICAL,	)	
ET AL.,	)	
	)	
Defendants-Appellees.	)	

ORDER

The Court has considered the application for permission to appeal filed by the appellant and the entire record in the above case, and it is the opinion of the Court that the application should be denied.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

IEZHJA HARTSELL, b/n/f JERRY UPTON	)	Knox County 03A01-9407-CV-00234
Plaintiff-Appellant	)	
v.	)	Hon Dale C. Workman Judge
FORT SANDERS REGIONAL MEDICAL and DR. RICHARD O. MANNING	)	FILED 95 APR 21 AM 10:29 Appellate Court Clerk Knoxville
Defendants-Appellees	)	

ORDER

This cause was regularly heard and considered by the Court. IT IS NOW ORDERED that the judgement of the Trial Court is affirmed. Costs of appeal are adjudged against the Plaintiff and her surety, for which execution may issue if necessary.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

IEZHJA HARTSELL, b/n/f	)	Filed
	)	95 APR 21 AM 10:29
Plaintiff-Appellant,	)	Appellate Court Clerk
	)	Knoxville
	)	
v.	)	Knox County
	)	03A01-9407-CV-00234
FORT SANDERS	)	
REGIONAL MEDICAL,	)	Hon. Dale C. Workman
ET AL.,	)	Judge
	)	
Defendants-Appellees.	)	Affirmed and Remanded

MICHAEL H. MEARES OF MARYVILLE FOR APPELLANT

RICK L. POWERS and JEFFREY L. INGRAM OF KNOXVILLE FOR APPELLEE FORT SANDERS REGIONAL MEDICAL CENTER

R. FRANKLIN NORTON and GARY G. SPANGLER OF KNOXVILLE FOR APPELLEE RICHARD O. MANNING, M.D.

OPINION

Goddard, P.J. (E.S.)

This action arises from a complaint filed April 7, 1989, by the Plaintiff, Iezhja Hartsell, a minor, by next friend, Jerry Upton, against Fort Sanders Regional Medical Center, Dr. Richard O. Manning and certain nurses in attendance at the Plaintiff's birth.

The Plaintiff was born on Sept. 28, 1983, at Fort Sanders. Dr. Manning was the mother's obstetrician. The complaint, as amended, alleged alternate theories of relief for medical malpractice, battery, outrageous conduct, and a violation of T.C.A. 39-4-206 [now 39-15-206] (rights to medical treatment of infant prematurely born during abortion). The Circuit Court for Knox County dismissed the Plaintiff's causes of action for outrageous conduct and violation of T.C.A. 39-15-206. The Court later dismissed the Plaintiff's cause of action for battery. The issue of medical malpractice was subsequently tried on March 2, 1993. The Plaintiff took a voluntary non-suit as to the nurses on March 3, 1993. At the close of the Plaintiff's proof, the Trial Court directed a verdict for Fort Sanders. The jury returned a verdict for Dr. Manning. This appeal followed.

The Plaintiff alleges that the Trial Court improperly limited her causes of action to medical malpractice, that it improperly excluded as unduly prejudicial certain proof that was offered, and excluded proof as to the Hospital's standard of care. Further, the Plaintiff claims that the Judge erred by failing to instruct the jury on a physician's duty not to abandon his patients. Specifically, the Plaintiff submits the following issues on appeal:

> I. Did the trial court err in limiting the Plaintiff's causes of action to medical malpractice?
>
> A. Did the trial court err in sua sponte dismissing the Plaintiff's Complaint for Battery when she was harmfully and offensively touched without her consent, either express of implied in law or fact?
>
> B. Did the trial court err in dismissing Plaintiff's Complaint for civil remedies under

Tenn. Code Ann. § 39-4-206 (now 39-15-206), when the Tennessee Legislature had mandated a statutory minimum standard of care for live born infants?

C. Did the trial court err in dismissing Plaintiff's Complaint for Outrageous Conduct when Defendant left the newborn Plaintiff to die in a hospital apart from her mother, unsupported and gasping for breath from approximately 7:35 a.m. until 8:20 a.m.?

II. Even if the trial court did not err in limiting Plaintiff's causes of action to medical malpractice, did it err in its instructions to the jury and evidentiary rulings on medical malpractice?

A. Did the trial court err in failing to instruct the jury on a physician's duty not to abandon his patients?

B. Did the court err in excluding evidence that the Defendants did nothing for the newborn Plaintiff until she "did not stop gasping at the end of five minutes" and further that Defendants stopped their resuscitation efforts when she "had a heart rate in excess of 100?"

C. Did the trial court err in prohibiting any impeachment of Defendant's witnesses with the Hospital's claim of having kept a 2 lb, 14 oz premature baby alive in 1924?

D. Did the trial court err in excluding proof of the Standard of Care as enunciated by

Judicial Council of the American Medical Association when Defendant Doctor had admitted the accuracy of the A.M.A.'s ethical rulings and had contractually agreed to abide by them?

III. Did the trial court err in directing a verdict in favor of Defendant Hospital when there was material evidence in the record which would support a verdict for the Plaintiff?

Iezhja Hartsell was born prematurely September 28, 1983, weighing only 1 pound, 5-3/4 ounces at birth. Her mother was an admitted cocaine and marijuana user and, as such, a high-risk patient. Dr. Manning was not in the delivery room at the time of the delivery. The nurses who delivered the baby began pumping oxygen to her lungs through a tube in her throat. When Dr. Manning learned this he ordered the removal of her breathing tube (called "extubation"), saying the infant was too premature to be viable. Almost one hour later, the baby was still breathing. The baby's mother had received Demerol shortly before giving birth, which made it more difficult for the baby to breathe on her own after birth. However, no drugs were given to the baby to counteract the effect, and no efforts were made to assist the baby in breathing. After the baby had been extubated, she was weighed and tagged in preparation for her death. Approximately one hour after her birth, the baby was still breathing, and was transported to the Premature Nursery at Fort Sanders. A neonatologist from nearby East Tennessee Children's Hospital was called in. The baby survived, with only a loss of hearing and accompanying speech problem, allegedly due to lack of oxygen during the first hour of her life. The Plaintiff is in most other respects a normal, healthy child today.

The three sets of issues raised by the Plaintiff will be dealt with in the order presented. The first deals with the Trial Court's limiting the Plaintiff's cause of action to medical malpractice.

The Plaintiff first contends that the Trial Court erred in dismissing the Plaintiff's cause of action for battery.[1] The Plaintiff contends that the act of administering Demerol to the mother and consequently to the Plaintiff via her mother's bloodstream, and the extubation, were two distinctive acts of tortious conduct constituting battery.

The first act, administering Demerol to the mother, clearly is not battery, since the mother had consented via contract with Dr. Manning for medical care, including the administration of proper drugs. The Plaintiff concedes that since this action was consensual, the only proper cause of action would lie in medical malpractice.

The issue of whether the extubation constitutes a battery depends on whether there was consent. If we find that the extubation constitutes a battery, it does not necessarily mean that there is no action for malpractice. Our Supreme Court has said that when battery exists, malpractice is not necessarily reached, but if no battery can be shown, the issue becomes one of malpractice. Cardwell v. Bechtol, 724 S.W.2d 739 (Tenn. 1987). Clearly, the Plaintiff was not able to give consent, but the Defendants maintain that the Plaintiff's mother gave consent. The mother, Leiza Hartsell, executed a special permit form when she was admitted to the Hospital the day the Plaintiff was born. The Trial Court noted

---

[1] The Plaintiff claims that the Trial Court dismissed this action sua sponte. However, the record indicates that the claim was dismissed pursuant to a motion for partial summary judgment by the Defendants.

that Dr. Manning had the consent to treat not only the mother, but also the baby. Since the Defendants were authorized to administer medical care, the extubation was consensual. We therefore find that the Trial Court correctly concluded that the Plaintiff's cause of action was for medical malpractice, not for battery.

We next turn to the issue of whether the Trial Court correctly dismissed the Plaintiff's complaint for civil remedies under T.C.A. 39-4-206 (now 39-15-206). That Section is titled "Rights to medical treatment of infant prematurely born alive during abortion." The Plaintiff claims that the language of the Statute requires medical personnel in attendance of a prematurely born infant to render aid. The Section reads in pertinent part as follows:

> (c) No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant born during the course of a lawful abortion, whether such fetus or infant is quick or not, so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care reasonable under the circumstances in the general vicinity in which they practice.

Abortion is defined by T.C.A. 39-15-201, as follows:

> (1) "Abortion" means the administration to any woman pregnant with child, whether such child be quick or not, of any medicine, drug or substance whatever, or the use or employment of any instrument, or other means whatever, with the

intent to destroy such child, thereby destroying such child before its birth.

The Plaintiff does not contend that she was born as a result of a failed abortion. Therefore, to find this Section applicable, we would have to hold that it applies to all infants born prematurely, not just to those born in the course of an abortion. The Plaintiff cites no cases, nor can we find any interpreting this Statute to apply to infants born prematurely other than during the abortion.

To extend the natural reach of this Statute would require us to ignore its plain language. This Section provides that a fetus born alive during an abortion is to be treated as a live birth, and to be accorded the same level of care afforded to all other premature births. The clear language of the Statute shows that it was designed to protect babies born during an abortion, not all babies born prematurely. This is not to say that premature babies are not to be protected. But this Section does not give babies born prematurely a special cause of action beyond that which they are already assured under the law of medical malpractice. We find that the Trial Judge was correct in dismissing the Plaintiff's cause of action for civil remedies under T.C.A. 39-4-206.

The next issue presented is whether the Trial Court erred in dismissing the Plaintiff's complaint for outrageous conduct in leaving the Defendant to die. The Plaintiff maintains that it was outrageous conduct to take her away from her mother, away from the nursery, and leave her to die while a nurse instructed a co-worker on the procedure for preparing her for death. It is important to note that the Plaintiff is complaining of conduct bestowed upon her, not on the effect of the conduct on her mother. Tennessee courts recognize the tort of outrageous conduct. Medlin v. Allied Investment Co., 217 Tenn. 469, 398 S.W.2d 270 (1966).

See also: Johnson v. Woman's Hospital, 527 S.W.2d 133 (Tenn. App. 1975). According to Medlin, before an action for outrageous conduct can be sustained: "(a) the conduct complained of must have been outrageous, not tolerated in civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury."

We hold the Trial Court was correct in dismissing the Plaintiff's complaint for outrageous conduct. The Plaintiff failed to allege any mental injury that occurred as a result of the Defendants' actions. In fact, the Plaintiff conceded in her brief that she has "no conscious memory of the ordeal." Instead, the Plaintiff summarily concludes that "[s]een through the minor Plaintiff's eyes, the Defendants' taking her away from her mother, not taking her to the nursery for an hour and instead preparing for her to die while her medical care was abandoned caused both severe physical and emotional distress." This is not enough to make out a claim for outrageous conduct. To find that such conduct was enough to cause the Plaintiff mental distress would mean that she was cognizant of her surroundings. It is highly unlikely that an infant, less than one hour old, would know that she was being taken away from her mother. It is far less likely that she would know that she was being taken away from her mother. It is far less likely that she would know what a nursery was, or that she should be in one, or that she was being prepared for her death. The Plaintiff cites the Restatement of Torts as saying that the tort of outrageous conduct is still developing. While this may be true, the law is sufficiently developed to require some kind of mental injury, which is lacking in this case. What might be outrageous conduct to a cognizant adult is not necessarily outrageous conduct to a barely living infant, with no memory of the conduct, nor any signs of mental injury resulting therefrom.

Having concluded that the Trial Court was correct in limiting the Plaintiff's cause of action to medical malpractice, we must now turn to the second set of issues the Plaintiff raises.

The Plaintiff first claims that it was error not to instruct the jury on a physician's duty not to abandon his patient. The Plaintiff offered Tennessee Pattern Jury Instructions §6.08 (now §6.16), which states:

> Once the physician-patient relationship has been established and the physician has undertaken to treat a patient, the physician is under a duty [not to abandon his patient and] to continue treating the patient unless and until the patient orders the physician off the case, the patient's condition improves so that the physician gives [due] notice of his intent to quit the case and provides an opportunity for the patient to obtain another physician's services.

The Defendant Dr. Manning claims that there was no error in the Trial Court's not giving the requested instruction because the allegation was not supported by the proof. He maintains that no abandonment occurred, because even though the baby's life support was withdrawn, monitoring of her continued, while Dr. Manning attended to his other patient, the mother.

We believe that the Plaintiff misunderstands the concept of abandonment as it applies to a physician-patient relationship. The Plaintiff maintains that the cessation of medical treatment alone constitutes abandonment. That, however, is not the case. The Pattern Instruction that the Plaintiff submitted is based upon the case of Burnett v. Layman, 133 Tenn. 323, 181 S.W. 157 (1915). Burnett is a classic illustration of abandonment. In that case, the

physician, after becoming alarmed that he had ruptured his patient's urethra, told the patient to find a surgeon and then quickly departed, making no attempt to help or otherwise relieve the patient's pain. The physician in that case obviously believed that further medical care was needed, but refused to administer it, and left the patient. As shown by Burnett and cases from other jurisdictions, abandonment requires a complete termination of the physician-patient relationship. See, e.g., Lee v. Dewbre, 362 S.W.2d 900 (Tex.Civ.App.1962). ("Abandonment, when used in cases dealing with the physician-patient relationship, generally means the unilateral severance of the professional relationship between himself and the patient without reasonable notice at a time when there is still the necessity of continuing medical attention.")

In this case, the Defendant could not have abandoned the patient, because the relationship was never severed. After determining, in his medical judgment, that no further treatment was warranted, Dr. Manning ordered the extubation. However, the Plaintiff was continually monitored by the nurses, and Dr. Manning ordered a neonatologist to examine the infant. Had the Plaintiff truly been abandoned, neither the monitoring nor the consultation of a specialist would have occurred.

Having concluded that no abandonment took place, it is obvious that the Trial Judge was correct in his decision not to charge the Plaintiff proposed instruction regarding a physician's duty not to abandon his patient. A court is not required to instruct the jury on an allegation that is not supported by the proof. Guy v. Vieth, 754 S.W.2d 601 (Tenn.1988).

We next consider whether the Trial Court erred in excluding statements contained in a medical record from Dr. Stephen C. Prinz. The Trial Court excluded the statements on the

ground that they were unreliable and that any probative value of the statements was outweighed by the danger of unfair prejudice, pursuant to Tennessee Rules of Evidence 403.[2]

The information the Plaintiff seeks to have reviewed is not part of the record before this Court. It is attached to the Plaintiff's brief as an appendix. Because it is not part of the record, we cannot review it. Consequently, we are not in a position to determine whether the evidence was properly excluded, and must affirm the Trial Court's decision.

The next issue is whether the Trial Court properly excluded evidence that Fort Sanders had kept alive a premature baby in the 1920s. Fort Sanders was granted a motion in limine to exclude the introduction of a television commercial the Hospital aired in 1988 regarding the Hospital keeping a 2-pound, 14-ounce premature baby alive in 1924.

Fort Sanders argues that the issue was waived by the Plaintiff in that she failed to raise it in her motion for a new trial. We agree. The Rule regarding such waiver is clear:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for

---

[2] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> new trial; otherwise such issues will be treated as waived.

Tennessee Rules of Appellate Procedure 3(e).

The Plaintiff did not raise the issue of the excluded evidence in her motion for a new trial. That failure constitutes a waiver of the issue on appeal. See Mason v. Tennessee Farmers Mut. Ins. Co., 640 S.W.2d 561 (Tenn.App.1982).

We next turn to the issue which complains of the Trial Court's excluding proof of American Medical Association rulings when Dr. Manning had contractually agreed to abide by those rulings. Again, we find that this alleged error has been waived.

The Plaintiff's Attorney attempted to introduce the evidence of the AMA rulings twice during trial. The first time, counsel tried to read into evidence a request for admission regarding the AMA rulings. That attempt was objected to on the grounds of hearsay. Counsel for the Plaintiff again tried to enter the opinions during the testimony of a witness. Both attempts were made on the first day of trial, and no offer of proof was made for either on that day. Counsel for the Plaintiff did try and offer the first attempt into proof at the close of all proof, but that was denied by the Trial Court, because it was not made the day the evidence was excluded. It is arguable that it was within the discretion of the Trial Court whether to allow the proof at that time. But assuming that it was not within the court's discretion, we do not think that it was anything more than harmless error to refuse to allow the testimony. As the Plaintiff concedes, ethical opinions are not the standard of care in Tennessee. The standard of care in a medical malpractice action is determined by competent expert medical testimony, according to T.C.A. 29-26-115. See also: Payne v. Caldwell, 796 S.W.2d 142, 143 (Tenn.1990):

> We see no ambiguity or lack of clarity in the dictates of T.C.A. 29-26-115. It provides unequivocally that each of the three basic elements of a medical malpractice action--the standard of care, the breach of the standard, and proximate cause--be proven by testimony of experts who were licensed and practicing in Tennessee or a contiguous bordering state during the year preceding the date that the alleged injury or wrongful act occurred.

Thus, the AMA opinion does not establish the standard of care, and its exclusion was not error.

The final issue that the Plaintiff presents is whether the Trial Court erred in directing a verdict for Fort Sanders Hospital. The Plaintiff maintains that she established the Hospital's standard of care, that said standard of care required consent of the patient to withdraw life support, and that no consent was obtained. Fort Sanders maintains that the Plaintiff offered no proof regarding a Hospital's standard of care, and because no prima facie case was established as to it, a directed verdict was proper. Once again, we must find the issue without merit.

Because we have held that the Trial Court properly limited the Plaintiff's cause of action to medical malpractice, the issue of whether a directed verdict was proper turns on whether the Plaintiff presented material evidence to support that theory.

To find that the Plaintiff presented evidence that she established the Hospital's standard of care would require us to read more into the record than is there.

The Plaintiff claims that she established Fort Sanders' standard of care by the testimony of Larry B. Snodgrass, who at the time of the Plaintiff's birth was the associate risk manager at the Hospital. The Plaintiff's attorney asked Mr. Snodgrass about a 1983 accreditation manual for hospitals. Fort Sanders was accredited in 1983. The Plaintiff claims that the following testimony of Mr. Snodgrass, referring to the accreditation manual, establishes a standard of care requiring the Hospital to obtain informed consent before treating a patient:

> Q: The patient should not be subjected to any procedure without his voluntary, competent, and understanding consent or that of his legally authorized representative.
>
> A. Yes. I would say that would be reasonable.
>
> Q. And applicable to Fort Sanders Hospital back on that date [when the Plaintiff was born]?
>
> A. Yes.

The Plaintiff then argues that there was no procedure in place to guarantee that consent would be obtained for withdrawing life support from a minor child who was unable to give consent. Mr. Snodgrass also testified, however, that the Hospital did not have a responsibility for obtaining informed consent:

> Q. Well, what you agreed with me with, I believe, was that the corporation, the hospital, had some responsibility with regard to making sure that the patients within the hospital -- consent was obtained before medically significant procedures were performed upon them, correct?

A. The hospital does not have the responsibility for informed consent. The hospital does take consent forms.

Mr. Snodgrass further testified that the decision to withdraw life support was to be made by the doctor and patient, or the patient's surrogate. Thus, Mr. Snodgrass' testimony did not establish a standard of care applicable to Fort Sanders that would require it to insure informed consent was obtained from the minor regarding the extubation. Consequently, the Plaintiff did not prove that Fort Sanders had an applicable standard of care for this situation, and was therefore unable to prove a breach of that standard. The directed verdict was appropriate as to Fort Sanders.

For the reasons stated above, the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Plaintiff and her surety.

S/ Houston M. Goddard, P.J.(E.S.)

CONCUR:

S/ Herschel P. Franks, J.

S/ Don T. McMurray, J.

FORT SANDERS PRESBYTERIAN HOSPITAL
NURSE'S ADMISSION ASSESSMENT AND NOTES

LABEL Girl Hartsell Cord blood sent to lab
Yes ____ No ____
Time of Birth 9/28/83 @ 7:24 a.m. Admitted to Premature Nsy
Time of Admission 8:30 a.m. Radiant Warmer Module X
Birth Weight 1#-5 3/4 oz Oxygen Conc. (by hood) ___%
Head _____ Chest _____ Incubator _____
Abdomen ____ Length ____ Temperature _____
Rectal Temperature unable to register on IVAC
Isolette warm gloves & porta warm mattress per Dr. Prinz
Apical Pulse 140 Temperature _____
Respirations 40 - gasping Oxygen Conc. 100 %
Flaring: Mild X Moderate _____ Severe _____
Grunting: Mild _____ Moderate _____ Severe _____
Retracting: Mild _____ Moderate _____ Severe X
Skin:
Color pink mucous memb. Jaundiced _____ Rash _____
Mottled _____ Dry _____

Cry: ~~Lusty~~ crying With Stimulation _____
Without Stimulation X Weak _____
Head:
Caput X Cephalohematoma ? Molding X
Bruised X Monitor Mark _____ Forcep Mark -
Abrasions _____ Petechiae _____ Other _____
Palate: Intact _____ Cleft _____ Lip Cleft _____
Cord:
3 Vessels Visible X
Clamped too closely to count vessels _____ Triple Dye _____
Umbilical Hernia _____ Other _____
Genitalia:
Anus: Patent X Other _____ Vulva: Normal X Other _____
Testicles: Descended Bilaterally _____ Undescended _____
Hydrocele _____ Inguinal Hernia _____ Other _____
Reflexes: Gag ____ Suck ____ Grasp X Moro X Babinski ____

Muscle Tone: Good ___ Fair _X_ Poor ___ Jittery ___ Other ___
AquaNephyton Mg. 1M or PO None Site of Injection _____
Comments: Dr. Prinz here @ 8:40 a.m. -- O_2 per hood started 7090 @ 8:30 a.m. -- DS 45-90 @ 9:10 a.m. -- (illegible comment)

S/ J. Luther
Signature

PROGRESS NOTES

(Labels at top of page "Hartsell Lieza A. Mrs." "9/28/83" "9:49 AM" "Charge Only" "Baby Girl")

9/28/83 8:30/am
Baby admitted to premature nsy in radiant warmer. Baby was 1# 5¾ - she was alert & actively crying c occ. gasping P/40 regular & strong, R 40 c severe retracting & mild flaring. O_2 was started per hood @ 70% (illegible word) Mucous memb pink, fair muscle tone, unable to register temp on IVAC, portawarm mattress placed under baby, gloves c warm water placed around baby. ETCH ICN called.

8:35/am
ETCH ICN transport team here.

8:40/am
Dr. Prinz here. Baby intubated by Dr. Prinz. c 2.5 E.TT & O_2 @ 100% & on ventilator & placed on (illegible word) heart monitor

9:00/am
umb. artery cath. put in by Dr. Prinz
ABG sent to lab

9:10/am
DS 45-90 per ICN nurse

9:30/am
Baby transferred to ETCH ICN in transport isolette c Dr. Prinz & transport team.
S/ J. Luther

ADMISSION

VIA Stretcher DATE 9-28-83 TIME 6:40 AM
NAME Lieza Hartsell M.N. Stigall H.N. Earnest AGE 27
ADDRESS 5043 Montwood Dr.
DISPOSITION OF VALUABLES _____
DOCTOR Manning DR. NOTIFIED Manning
PARA (3 dots over 3 dots) GRAVIDA ~~VI~~
EDC 23 Jan. GESTATION 23½
MEMBRANES: Intact _____ Ruptured A Time 6:55
EXAMINATION _____
T.P.R. 97°-88-22 B.P. 142/70 F.H.T. _____
PREP. _____ ENEMA _____
PCV & HGB _____ RH FACTOR O pos PTT _____
URINE SPECIMEN _____
ANESTHESIA PREFERENCE _____ CONTACT LENS _____
WHEN LAST EATEN _____ HEIGHT 5'4 WEIGHT 173
DENTURES None EXISTING CONDITION OR DISEASE _____
ALLERGIES NKA
ANALGESTA DURING LABOR _____
COMMENTS: This lady's dates are accurate & confirmed by 2 utlrasounds, the most recent one was done yesterday to rule our placenta previa. I think it completely wrong to perform heroic measures as 1° Cesarean to "save" a 23 week fetus or to have neotologist [sic]here for delivery. S/ R.O. Manning

---

DELIVERY

DATE 9-28-83 TIME 7:24 am
INDUCTION definite abruptio placenta
ONSET OF LABOR 3 am COMPLETE DILATION 7:20 am
PRESENTATION ceph LOP POSITION OF DELIVERY ROP
TYPE OF DELIVERY: Spontaneous Yes Forceps No
C. Section No
PLACENTA: Time 7:42 am Method Simple Episiotomy No

Laceration No
ANESTHESIA IV Demeroi OXYTOCIC Pitocin
ESTIMATED BLOOD LOSS 350-400
STAGES OF LABOR: 1st Stage 3 hours 2nd Stage 4 minute
3rd Stage 18 minute
SCRUB NURSE _____
CIRCULATING NURSE S/ F. Goodman S/ L. Hults
COMMENTS: Patient delivered non viable fetus in labor room bed, blood loss seemed around 350-400 cc only

---

NEWBORN

SEX Girl NAME Hartsell BRACELET NO. 1011
WEIGHT 1 lbs 5¾ oz LENGTH 12½ inches COLOR B
PEDIATRICIAN _____ RH FACTOR _____
CORD BLOOD TO LAB _____
BREAST ____ BOTTLE ____
GENERAL CONDITION extremely premature - critical
APGAR: 1 Min. 2 5 Min. 1
INJURIES none noted ANOMALIES none noted
RESUSCITATION 7:25 a.m. to 7:30 a.m. - O_2 c entratracheal tube and ambu by M. Tinker & L. Hults
~~CONDITION TO NURSERY~~ _____
SILVER NITRATE 1% EYE GTTS 2 IN EACH EYE _____
CIRCUMCISED IN DELIVERY ROOM _____
COMMENTS: Apgar at 1 min. - Heart rate 50, infrequent gasps, Apgar at 5 min. (1), 40 heart rate - 7:30 a.m. Dr. Manning here and suggested CPR attempts discontinued due to nonviability of fetus, attempt abandoned, 8:20 a.m. spont. resp. to nursery

Fort Sanders Presbyterian Hospital
Knoxville, Tennessee
Obstetrical Record

S/ Richard O. Manning M.D.
Signature

BABY CHART

Fort Sanders Regional Medical Center
ORDERS AND PROGRESS NOTES

Hosp. No. _____
Room _____

Name Lieza Hartsell Doctor _____

_____

_____

Date 9/28/1983
Progress Notes
Anesthesia note regarding resuscitation of newborn baby girl Hartsell:

baby was delivered spontaneously in bed and was immediately taken to delivery room #2 by Linda Hults, R.N. On her way Linda called for me. I was only a few seconds behind her into delivery room. I entered delivery room @ 7:25 A.M., baby was born @ 7:24 AM. The one minute apgar was 2 - 1 for heart rate and 1 for resp. effort. baby intubated c̄ ease c̄ #2.5 O-T tube. B.B.S. audible. heart rate 50. At 7:30 AM, Dr. Manning entered delivery room and was asked by Linda what we should do. Dr. Manning suggested we discontinue CPR due to non-viability of newborn. attempt abandoned (heart rate at time CPR abandoned was 40). I was not informed until about 10 minutes after I had abandoned CPR that Mrs. Hartsell had been given some Demerol IV shortly (before) arrival to labor room. At 8:20 AM, Janie Lanham, R.N., noticed increased respirations and heart rate in newborn and immediately pt. was taken to nursery by Linda Hults, R.N.

Fort Sanders Regional Medical Center
ORDERS AND PROGRESS NOTES

Hosp. No. _____
Room _____

Name Lieza Hartsell Doctor _____

_____

_____

Date 9/28/1983
Progress Notes
Continuation of Anesthesia Note:
The nursery called me about 2 minutes later to reintubate the baby. I tried $\underline{x}$ ___ for about 30 seconds $\overline{s}$ success. While ventilating the baby $\overline{c}$ ambu Dr. Prinz from Children's Hospital arrived and took charge.

FSAG/ S/ M. Tinker CRNA

#102932 RM: ICN
Hartsell, Baby Girl
Dr. Prinz
AGE: 2 hours
ADMITTED: 9/28/83
RESP: Ernest Hartsell

East Tennessee Children's Hospital

Knoxville, Tennessee

History & Physical Examination
cc: Sandra McBee-Birth Certificates
2-West, Ft. Sanders Prsby. Hospital

HISTORY

Baby Girl Hartsell was a .625 kg., approximately 25-26 week gestation black female infant admitted on referral by Dr. Manning from Ft. Sanders Hospital. The infant was born at 7:24 a.m. to a twenty-seven year old Gravida VI, Para III, AB II, married black female who had had no problems during this pregnancy prior to onset of spotting last night. Early this morning the mother developed continuous spotting and premature onset of labor. At this point Dr. Manning ruptured the mother's membranes and allowed her to go ahead and precipitate in bed since two ultrasounds and dates confirmed a 22-23 week gestation. The child precipitated in bed at 7:24 a.m. and had Apgars of 2 and 1. When the infant did not stop gasping at the end of five minutes the nurse anesthetist was called by a labor room nurse who came in and took the infant to the labor room where an endotracheal tube was inserted and resuscitated the infant until Dr. Manning arrived. Dr. Manning arrived at 7:31 a.m. and instructed the resuscitation team to discontinue efforts. At this point the infant had a heart rate in excess of 100 and was slightly dusky. At approximately 8:20 a.m. the infant was still found to have a reasonable heart rate and was gasping some at this point. The labor room nurse took the infant to the nursery where the nursery nurses vigorously resuscitated the infant and called the nurse anesthetist back to intubate. Dr. Manning was consulted by the nursery personnel and requested that the ETCH Transport Team be called. At the time I arrived I found the infant being bagged intermittently and the nurse anesthetist

attempting to reintubate the baby. He was unsuccessful at this point and so I intubated the child with a 2.5 endotracheal tube and we bagged the infant. The infant was pink and active with good tone at this point. I then inserted a UAC and drew an arterial gas. Initial arterial gas revealed pH 7.13, pCO2 31, pO2 52. The negative base excess was -15.9. The infant was given 2.5 mili equ. of Bicarb in 2.5 cc's of water over 5-10 minutes by slow push and then transported back to ETCH on a chemical heating mattress and with warm gloves at the infant's sides in the warmer. The child's temperature on our arrival at Ft. Sanders was less than 94°. By the time we arrived back at ETCH the infant had a temperature of 96.9° rectally, heart rate 165, respirations 23, and an initial BP 22/12. The infant generally appeared to be a 25-26 week gestation black female infant in a moderate amount of respiratory distress.

HEENT: Anterior fontanelle open, soft and pulsatile. Pupils equal, round and reactive to light. Eyes are open. Normal red reflex. Palate intact. Some bruising of the occiput with a small hematoma on the occiput. LUNGS are clear to auscultation. Peripheral pulses all palpated and within normal limits. ABDOMEN: No palpable masses. No increase in liver, kidney or spleen. UMBILICUS has two arteries and one vein. G.U.: Normal female. Rectum patent. Full abduction of the hips. SKIN normal except for bruising of the occiput.

_____ M.D.
Attending Doctor

CH #026

NEUROLOGIC: Good tone, good grasp, absent suck and Moro. Cranial nerves intact.

ADMITTING IMPRESSION:

1) Premature Birth Living Child, AGA, 25-26 Weeks Gestation
2) Respiratory Distress Syndrome, HMD versus TTN
3) Rule Out Sepsis
4) Perinatal Asphyxia
5) Hypothermia

PROBLEM (1): Premature birth living child, AGA - The dates and ultrasounds seemed to indicate that the infant was 22-23 weeks gestation but on examination the infant appears to be 25-26 weeks gestation. There were no maternal problems prior to the premature onset of labor and spotting.

PROBLEM (2): RDS - INITIALLY the child was placed on a rate of 25, PAP 18, PEEP 3 and 100% oxygen after intubation. Currently the child has weaned down to a rate of 19, PAP 14, PEEP 3 and 50% oxygen. Arterial gases have been good and she has not required the use of much buffer. The infant does not really appear to have significant Hyaline membrane disease at this time.

PROBLEM (3): Rule out sepsis - There was no septic risk other than prematurity. Membranes were not ruptured for a prolonged

period. The infant's CBC on admission revealed hematocrit 38, white count 16,000 with 34 polys, 31 bands, 28 lymphs and 2 monos. Platelet count was 152,000. The child was covered with 150 mgs./kg/day of Ampicillin and 5 mgs/kg/day of Gentamicin. Urine Welchogen blood culture and ET culture were obtained.

PROBLEM (4): Perinatal asphyxia - The infant had Apgars of 2 at one minute and 1 at five minutes. This increased rapidly after resuscitation. By ten minutes of age the infant was intubated and being bagged. The infant perked up almost immediately. At 7:31 a.m. Dr. Manning arrived and requested an end to resuscitation efforts. The infant had no active resuscitation and was not bagged or supported until around 8:25 a.m. The child was moved to the nursery at about 8:20 to 8:25 a.m. Immediately after arrival in the nursery resuscitative efforts were vigorous and the nurses called to arrange transport to ETCH. So far the infant has not had any evidence of intraventricular hemorrhage and is alert and active.

PROBLEM (5): Hypothermia - The child's temperature on admission to the ETCH ICN had come up from less than 94 to 96.9°. By the twelve noon temp her temperature was 98.8° rectally. We have warm mist flowing in on the infant currently.

_____ M.D.
Attending Doctor

ETCH #026

ICN
Hartsell, Baby Girl
Dr. Prinz
Admitted: 9/28/83

East Tennessee Children's Hospital

Knoxville, Tennessee

History & Physical Examination

continuation (3)

PROBLEM (6): Fluids, lytes, and nutrition - The infant is currently on 120 cc's/kg/day of D5W. Lytes today revealed sodium 139, potassium 4.3, chloride 108. Blood sugar 99. The infant has voided since admission.

PROBLEM (7): Calcium - She has had calcium gluseptate added to the I.V. fluids in maintenance doses.

PROBLEM (8): Bilirubin - Both mother and child are O+and the direct Coomb's is negative. Admission bilirubin was 1.7 but the child's head is bruised and I am afraid she will become jaundiced from this source.

PROBLEM (9): Hem status - See number three.

S/ Stephen C. Prinz M.D.
Attending Doctor

ETCH #026
SCPjj T: 10/4/83

STEPHEN C. PRINZ, M.D.

No. 95-1202

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

IEZHJA HARTSELL, A Minor By Next Friend, JERRY UPTON,

Petitioner,

vs.

FORT SANDERS REGIONAL MEDICAL CENTER and RICHARD O. MANNING, M.D.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for Tennessee, Eastern Section

BRIEF IN OPPOSITION FOR RESPONDENT FORT SANDERS REGIONAL MEDICAL CENTER

RICK L. POWERS
Counsel of Record
DAN D. RHEA
ARNETT, DRAPER & HAGOOD
Attorneys for Respondent Fort Sanders Regional Medical Center
2300 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929
(423) 546-7000

8371
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED FOR REVIEW

Does the Fourteenth Amendment dictate that either Tennessee's common law of battery or Tennessee's statutes regulating abortion procedures must apply to the cessation of artificial life support measures in behalf of an unaborted newborn infant?

CORPORATE AFFILIATES OF RESPONDENT

Respondent Fort Sanders Regional Medical Center is a wholly-owned subsidiary corporation of Fort Sanders Alliance, a Tennessee non-profit corporation. The respondent owns no subsidiary corporations.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Corporate Affiliates of Respondent	ii
Table of Contents	iii
Table of Citations	iii
Opinion Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	3
Other Misstatements in the Petition	6
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Cruzan v. Missouri Department of Health, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) 11

DeShaney v. Winnebago County, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) 3, 4

Ferri v. Ackerman, 444 U.S. 197, 100 S. Ct. 402, 62 L. Ed. 2d 335 (1979) 3, 4

Contents

	Page
Gorieb v. Fox, 274 U.S. 603, 47 S. Ct. 675 (1927)	5, 6
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) ..	7
Martinez v. State of Calif., 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)	3, 4
Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)	4, 5
Statutes Cited:	
Tenn. Code Ann. § 20-5-106(c)	8
Tenn. Code Ann. § 39-4-206	2, 4
Tenn. Code Ann. § 39-15-201(a)(1)	5, 9
Tenn. Code Ann. § 39-15-206	2
28 U.S.C. § 1257	1, 4
28 U.S.C. § 1257(a)	1
28 U.S.C. § 1927	6, 12
United States Constitution Cited:	
Fourteenth Amendment	i, 3, 4, 5, 8

Contents

Page

Rules Cited:

Supreme Court Rule 10 ..... 4, 6

Supreme Court Rule 10(c) 4

Supreme Court Rule 15.2 6

Supreme Court Rule 42.2 ..... 6, 12

OPINION BELOW

Hartsell v. Fort Sanders Regional Medical Center, 905 S.W. 2d 944 (Tenn. Ct. App. 1995) (Appl. Perm. To App. Den. 1995).

STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction over the Petition because the judgment of the Tennessee Court of Appeals, Eastern Section, did not adjudicate any claimed rights, privileges, or immunities under the United States Constitution or any other federal law. 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The named petitioner (hereinafter "plaintiff") was born, at a severely premature stage of gestational development on September 28, 1983 at the respondent hospital, Fort Sanders Regional Medical Center. Both prior to and immediately after the plaintiff's birth, the obstetrician, Richard O. Manning, M.D. (hereinafter "Dr. Manning") determined from objective indications of the gestational age of the plaintiff that she was not "viable" or capable of living on her own. Accordingly, Dr. Manning instructed the hospital's nursing staff to discontinue artificial life-support measures they had instituted in plaintiff's behalf.

Less than an hour later, plaintiff's efforts to continue breathing were observed, and artificial life-support measures in her behalf were reinstituted. The plaintiff survived, but claims to have been injured by her experience immediately after her birth. At no time did any physician or hospital staff member attempt to terminate plaintiff's mother's pregnancy by any means other than natural childbirth, and at no time did anyone undertake any affirmative action to shorten plaintiff's life beyond the withdrawal of artificial life-support measures.

The plaintiff, through a "next friend," sued Dr. Manning and the hospital in a Tennessee state court six years later, on the theory that the cessation of artificial life support measures after plaintiff's natural birth constituted medical malpractice, and/or a battery. The plaintiff later added to her suit a theory of outrageous conduct, and a claimed violation of one of Tennessee's *abortion* regulation statutes, Tenn. Code Ann. § 39-4-206 (now codified at Tenn. Code Ann. § 39-15-206), despite the fact plaintiff did not claim, in state court, to be the victim of an induced abortion.

The trial court dismissed plaintiff's claims of outrageous conduct and battery. The trial court also dismissed plaintiff's statutory claim derived from Tennessee's abortion statute. The trial court proceeded with a jury trial on plaintiff's remaining medical malpractice claim. The trial court directed a verdict for the respondent hospital in the course of that trial, but ultimately, the jury rendered a general defense verdict in behalf of Dr. Manning, implicitly finding that Dr. Manning's actions either were not medical malpractice, or else caused no harm to the plaintiff, or both.

The Tennessee Court of Appeals for the Eastern Section affirmed. That court held that the dismissal of plaintiff's battery claim was proper because Dr. Manning, and the hospital staff, had plaintiff's mother's consent to render medical treatment to the newborn infant at her birth. The court further affirmed the trial court's dismissal of plaintiff's statutory claim, based on Tennessee's abortion statute, on the ground that that statute did not apply to unaborted, newborn infants like the plaintiff. The Court of Appeals addressed no federal constitutional issues. The Tennessee Supreme Court denied discretionary review of plaintiff's claims.

REASONS FOR DENYING THE WRIT

The plaintiff asserts that the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution compel the State of Tennessee, and its courts, to grant the plaintiff a jury trial on either her claim of common law battery, or else her statutory claim based on one of Tennessee's abortion regulations. The plaintiff cites no decision of this Court, no decision of any federal Circuit Court, and indeed no legal authority at all to support that interpretation of the Fourteenth Amendment. To the contrary, the Fourteenth Amendment does not compel states to offer common law damage remedies for privately caused injuries at all; and when they do offer such remedies, the Fourteenth Amendment does not compel any particular form, characterization, classification, or minimal elements for those remedies. *See Martinez v. State of Calif.*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). Likewise, the Constitution does not compel the states to promulgate abortion regulations. If the states choose to promulgate such regulations, the Constitution does not require the states to include civil remedies therein for unaborted children who have undergone natural childbirth. The Fourteenth Amendment limits *state* actions only; it does not purport to impose requirements of state protection against purely *private* actions. *DeShaney v. Winnebago County*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

The scope, extent, reach and application of a state's tort law are strictly matters of state law, and for state judicial determination only. *Ferri v. Ackerman*, 444 U.S. 197, 100 S. Ct. 402, 62 L. Ed. 2d 335 (1979) ("when state law creates a cause of action, the state is free to define the defenses to that claim. . . ." 444 U.S. at 198, 100 S. Ct. at 406). Likewise, the interpretation of state abortion regulations, including the interpretation of who is to be protected by them, are strictly questions of state law, and

state judicial determination only. Federal constitutional law imposes certain limits and restrictions on how far states can go in those areas, but the Constitution imposes absolutely *no* affirmative requirements of what state law *must* provide in the area of civil torts, or abortion regulation. *See Martinez, supra; Ferri, supra; DeShaney, supra.*

Accordingly, in arguing that Tennessee's courts *should have* recognized and tried either the plaintiff's common law battery claim, or else her state statutory abortion claim, the plaintiff argues issues of state law only, which are merely dressed, superficially, in the verbiage of federal constitutional rights. Applying the criteria for consideration of Petitions for the Writ found in Supreme Court Rule 10, the petitioner (who never cites or refers to Rule 10, or any of its criteria, in her Petition) has not identified any decision by any court that conflicts with the decision of the Tennessee Court of Appeals in this case *on any question of federal law.*

For that matter the petitioner has not identified any important question of federal law actually "decided by" the Tennessee Court of Appeals in this case. *See* Supreme Court Rule 10(c). The plaintiff actually presented only two arguments of federal law to the Tennessee Court of Appeals. The plaintiff invoked this Court's case of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) in a hard-to-comprehend argument that the present non-abortion case somehow represents an extension or revision of *Roe v. Wade* principles. The plaintiff also invoked one of Tennessee's *abortion* regulation statutes, Tenn. Code Ann. § 39-4-206, and claimed that Fourteenth Amendment equal protection principles required the extension of that *abortion* statute beyond abortion procedures to cover unaborted newborn infants like the plaintiff. The Tennessee Court of Appeals adjudicated neither of these putatively federal claims, leaving this Court without subject matter jurisdiction over the Petition. 28 U.S.C. § 1257.

This is not an abortion case, and never has been! The plaintiff, an unaborted, spontaneously-born infant, has never claimed to be the victim of an abortion *as that term is specifically defined in Tennessee's abortion regulation statutes. See* Tenn. Code Ann. § 39-15-201(a)(1) (defining "abortion" as an attempt to destroy a child "before its birth"). *Roe v. Wade, supra*, addressed the Fourteenth Amendment *privacy* rights of pregnant women against interference by the state. No one has ever claimed any violation of a right to privacy in this case. *Roe v. Wade* has no application, or relevance, to this case, where *no one* attempted to terminate plaintiff's mother's pregnancy before plaintiff's birth. The Tennessee Court of Appeals decided *no* privacy issues whatsoever, much less any privacy issues regarding pregnant women.

The plaintiff's equal protection argument below was equally strained. The plaintiff argued that if Tennessee's abortion statute was not extended to her, as an unaborted infant, then it would unconstitutionally give aborted fetuses more rights to medical care than those given to plaintiff as an unaborted infant. That argument was, and is, premised entirely on an unsupported interpretation of Tennessee law, that Tennessee's abortion statute somehow gives more rights, as a matter of *state* law, to aborted fetuses than otherwise bestowed by *state* law on naturally born children. The Court of Appeals did not adopt or endorse this interpretation of *state law*, and therefore never reached plaintiff's equal protection claim. The Court of Appeals did not have any bona fide claims of aborted fetuses before it to warrant construction of Tennessee's abortion statutes. A court cannot construe a statute that does not affect any parties actually before the court. *See Gorieb v. Fox*, 274 U.S. 603, 47 S. Ct. 675 (1927).

Beyond that, plaintiff's equal protection argument concerning Tennessee's abortion statute, even if accepted at face

value, would go toward the invalidation of that abortion statute, rather than any unprecedented judicial extension of a state statute beyond its expressly stated meaning. The validity or invalidity of Tennessee's abortion regulations under the Fourteenth Amendment cannot be tested in the absence of facts, and of parties actually affected by those regulations. *See Gorieb v. Fox, supra*. The plaintiff has not been affected by any Tennessee abortion regulation! To repeat, this is not an abortion case, and never has been!

Accordingly, the Petition for Writ of Certiorari does not present a federal question within this Court's jurisdiction, because the Tennessee Court of Appeals adjudicated *no* federal questions. Moreover, the Petition should be denied as not raising any substantial federal question within the criteria of Supreme Court Rule 10. Most respectfully, the court should consider awarding sanctions and damages to the respondents for this frivolous filing, pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927.

OTHER MISSTATEMENTS IN THE PETITION

Out of an abundance of precaution, and pursuant to the admonitions of Supreme Court Rule 15.2, the respondent respectfully submits the following list of other misstatements of fact or law contained in the Petition.

> 1. "The decision of an intermediate state appellate court has been held to be the highest court of a state for purposes of certiorari to the United States Supreme Court where the highest court denied discretionary review. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968)." Quotation from page 1 of Petition.

Response: The *Interstate Circuit* case was reviewed by the Supreme Court pursuant to its then mandatory jurisdiction, and not pursuant to its certiorari jurisdiction over state court proceedings under the current version of 28 U.S.C. § 1257. This is not a material issue, however, inasmuch as the petitioner's application for discretionary review before the Tennessee Supreme Court contained the same deficiencies, with respect to *not* raising any bona fide or substantial federal questions, as did petitioner's brief to the Tennessee Court of Appeals.

> 2. "In addition to the injury, pain and suffering Plaintiff endured for the hour she struggled to breath without Defendants' assistance, . . ." Quotation from page 6 of Petition.

Response: These particular damage allegations were never proven, and the general jury verdict against the petitioner may well have rejected them.

> 3. "Subsequently, and *sua sponte*, the trial court offered to and dismissed Plaintiff's cause of action against Defendants alleging battery." Quotation from page 7 of Petition.

Response: In reality, the trial court dismissed plaintiff's battery claims pursuant to defendants' motions for partial summary judgment. *See* Footnote 1, Court of Appeals Decision, 905 S.W. 2d 944 at 947.

> 4. "In this case the facts before the Court posed directly the question of whether the appellant is a citizen at the moment of her birth or whether her citizenship must first pass a test of 'viability' that only her

> physician can administer." Quotation from page 9 of Petition.

Response: The petitioner was granted a trial on her claim for medical malpractice against the defendants, a state-created right available to "citizens" and not available to non-viable fetuses. *See* Tenn. Code Ann. § 20-5-106(c) (extending wrongful death claims only to fetuses "viable" at the time of injury). Dr. Manning's initial determination that plaintiff was not a viable fetus obviously did not forestall the plaintiff's right to a jury trial, as a citizen, on her medical malpractice claim. The procedures followed by Tennessee courts in this case plainly recognized plaintiff's citizenship and state created common law right to sue for personal injuries, *despite* Dr. Manning's initial determination of non-viability. The plaintiff never raised this "question" of her "citizenship" below.

> 5. "It is unconstitutional for either the Tennessee courts or indeed the United States Supreme Court to delegate to members of the medical profession, the determination of which citizens are entitled to the Fourteenth Amendment protection." Quotation from page 12 of Petition.

Response: Obviously no one has done any such thing. Tennessee's courts granted the plaintiff a jury trial on her medical malpractice claim, and the plaintiff lost. That fully satisfies the requirements of the Fourteenth Amendment concerning state tort claims. The plaintiff never raised the question of her "citizenship" below.

> 6. "[Plaintiff] has lost her right to civil remedies guaranteed to every other citizen." Quotation from page 13 of Petition.

Response: Again, the plaintiff was given a civil jury trial on her tort claim, and she lost. The plaintiff has offered no evidence or court precedent to show that any other severely premature infant whose artificial life support measures were withdrawn on the basis of non-viability has been granted a right to sue specifically for battery or for violation of one of Tennessee's abortion statutes. Absent such a showing, the plaintiff's claim of denial of equal protection is an unaddressable hypothetical abstraction.

> 7. "The Court of Appeals of Tennessee, Eastern Section has withheld [plaintiff's] right to seek civil redress for common law and statutory violations by judicial sleight of hand." Quotation from page 13 of Petition.

Response: The Court of Appeals ruled that the consent defense to battery applied as a matter of state law in this case, on the facts before it. The Court of Appeals also ruled that Tennessee's abortion statute did not apply to an unaborted newborn infant. Plaintiff cites no law requiring the state to apply either one or the other of those theories to these facts. At any rate, perceived errors of state law and/or state procedure are not matters of federal Constitutional concern.

> 8. "Defendants' expert justifies the Defendants' actions by addressing Plaintiff's birth in terms of an abortion." Quotation from page 17 of Petition.

Response: Even petitioner's purely semantical arguments, such as this one, misdefine and misconstrue terms. An "abortion" *as used in Tennessee's abortion statutes* clearly means an intentionally induced termination of a pregnancy; not a spontaneous live birth. *See* Tenn. Code Ann. § 39-15-201(a)(1) (defining "abortion").

> 9. "The ruling of the Court of Appeals of Tennessee stands [T.C.A. §39-4-206] on end by impermissibly establishing two classes of infant rights to medical care: ones which can be enforced by civil action under the Tennessee abortion statute and the common law of battery and ones which cannot." Quotation from pages 17 and 18 of Petition.

Response: This statement is based upon petitioner's counsel's own unique, unsanctioned, unsupported, and strained interpretation of the cited abortion statute. Tennessee's courts have certainly never endorsed that interpretation in any reported precedent. In addition, no Tennessee precedent is offered to support plaintiff's bare assertion that an aborted fetus, who is born alive, would necessarily have either a statutory claim (apart from one based on a medical malpractice theory) or a common law right of action for battery in the event his physician withdraws artificial life support measures. The statute nowhere suggests such specific causes of action, and no precedent is offered to show that either exists. The plaintiff's medical malpractice claims based on the withdrawal of artificial life support measures were heard and decided by a jury.

> 10. "The decision of the Court of Appeals of Tennessee is that only physicians and their standard of care can determine the right to receive or withdraw life saving care." Quotation from page 21 of Petition.

Response: The plaintiff was given an opportunity to convince a jury that Dr. Manning had a professional duty of care to provide artificial life support to the plaintiff immediately after her birth. She complains here of nothing more than losing her case.

The State of Tennessee may very well have chosen not to require physicians to render treatment, even potentially life-preserving treatment, that in the exercise of reasonable care, they consider to be ineffective. The petitioner cites absolutely no federal constitutional authority prohibiting states from making such a choice. This Court's case of *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (which was *never* cited below) validates and recognizes *state* policymaking authority in regulating privately authorized withdrawals of artificial life support measures. The Fourteenth Amendment, which restricts state action only, certainly dictates no contrary policies to the states.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

In addition, the petitioner's trivialization of important constitutional protections, and frivolous filing should be discouraged in the strongest possible terms. The Petition has occupied the time and resources of both of the respondents, as well as of this Court, undoubtedly at some cost to its more important duties. Respectfully, the respondents ask this Court to not only deny the Petition for Writ of Certiorari, but to consider the appropriateness of an award of damages to the respondents pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927.

Respectfully submitted,

RICK L. POWERS
Counsel of Record
DAN D. RHEA
ARNETT, DRAPER & HAGOOD
Attorneys for Respondent
Fort Sanders Regional
Medical Center
2300 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929
(423) 546-7000

Supreme Court, U.S.
FILED
FEB 27 1996
CLERK

No. 95-1202

In The

Supreme Court of the United States

October Term, 1995

IEZHJA HARTSELL, A Minor
By Next Friend, JERRY UPTON,

Petitioner,

versus

FORT SANDERS REGIONAL
MEDICAL CENTER and
RICHARD O. MANNING, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Eastern Section

RESPONDENT'S BRIEF IN OPPOSITION

R. FRANKLIN NORTON
Counsel of Record
GARY G. SPANGLER
LYNN C. PETERSON
NORTON AND LUHN, P.C.
550 Main Avenue, Suite 900
P.O. Box 2467
Knoxville, TN 37901-2467
(423) 971-4600
Attorneys for Respondent,
Richard O. Manning, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTION PRESENTED FOR REVIEW

Were the due process and equal protection clauses of the United States Constitution violated when the Tennessee Courts limited plaintiff's cause of action against defendants to medical malpractice?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF CASE 4

A. SUMMARY OF PROCEDURAL HISTORY 4

B. STATEMENT OF THE FACTS 5

ARGUMENT 13

I. THE UNITED STATES SUPREME COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION BECAUSE THIS CASE INVOLVED ISSUES OF STATE LAW WHICH ARE NOT OF A MAGNITUDE SUFFICIENT TO WARRANT REVIEW BY THIS COURT 13

I(A). THE PETITION SHOULD BE DENIED BECAUSE PETITIONER FAILED TO PROPERLY RAISE AND/OR PRESERVE ANY ISSUE OF FEDERAL LAW IN THE TENNESSEE COURTS 15

II. THE DECISION BY THE TENNESSEE COURTS TO DISALLOW PLAINTIFF FROM PROCEEDING TO TRIAL ON HER CLAIM OF COMMON LAW BATTERY, OR HER STATUTORY CLAIM BASED ON ONE OF TENNESSEE'S ABORTION REGULATIONS DOES NOT VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 19

TABLE OF CONTENTS – Continued

Page

II(A). THE TENNESSEE COURT'S INTERPRETATION OF THE APPLICATION OF ONE OF ITS ABORTION REGULATIONS TO THE FACTS OF THIS CASE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT ... 19

II(B). THE TENNESSEE COURTS DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN IT LIMITED PLAINTIFF'S TRIAL TO A CLAIM OF MEDICAL MALPRACTICE 22

CONCLUSION 23

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES:

Bailey v. Anderson, 326 U.S. 203 (1945) 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14

Chicago, I. & L. R. Co. v. McGuire, 196 U.S. 128 (1905) 18

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 19

Conley v. Gibson, 355 U.S. 41 (1957) 14

Ferri v. Ackerman, 444 U.S. 193 (1979) 17

Gorieb v. Fox, 274 U.S. 603 (1927) 21

Martinez v. State of California, 444 U.S. 277 (1980) 17

Monks v. New Jersey, 398 U.S. 71 (1970) 15

Street v. New York, 394 U.S. 576 (1969) 15, 18

The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629 (1819) 22

United States v. Atkinson, 297 U.S. 157 (1936) 18

STATUTES:

Tenn. Code Ann. § 29-26-115 .....4, 20

Tenn. Code Ann. § 39-4-206 ..... 2, 4, 21

Tenn. Code Ann. § 39-15-206 ..... 2, 18, 20

Tenn. Code Ann. § 39-15-206(c) ..... .20, 21

28 U.S.C. § 1257 .....1, 15

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Black's Law Dictionary, 4th Ed. Rev. (1968) 22

United States Supreme Court Rule 10 ..... 13, 15, 17

United States Supreme Court Rule 10(c) 18

United States Supreme Court Rule 42.2 24

U.S. Const. amend. XIV ..... *passim*

JURISDICTIONAL STATEMENT

The United States Supreme Court lacks jurisdiction over the Petition because this case involved issues of state law which are not of a magnitude sufficient to warrant review by this Court, the Tennessee Court of Appeals did not decide any federal question in ruling on this case, and Petitioner has not properly preserved the alleged Constitutional claims. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1

"(a) The rights to medical treatment of an infant prematurely born alive in the course of an abortion are the same as the rights of an infant of similar medical status prematurely born spontaneously. Any person who performs or induces an abortion of such an infant shall exercise that degree of professional skill, care, and diligence in accordance with good medical practice necessary to preserve the life and health of such infant prematurely born alive in the course of an abortion,

except that if it can be determined, through amniocentesis or medical observation, that the fetus is severely malformed, the use of extraneous life support measures need not be attempted.

(b) Any person who violates this section is guilty of a Class E felony.

(c) No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant during the course of a lawful abortion, whether such fetus or infant is quick or not, so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care reasonable under the circumstances in the general vicinity in which they practice."

Tennessee Code Annotated, § 39-4-206 (now § 39-15-206)

"(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

(c) In a malpractice action as described in subsection (a) of this section there shall be no presumption of negligence on the part of the defendant. Provided, however, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

(d) In a malpractice action as described in subsection (a) of this section, the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury

shall be further instructed that injury alone does not raise a presumption of the defendant's negligence."

Tennessee Code Annotated § 29-26-115

STATEMENT OF THE CASE

A. SUMMARY OF PROCEDURAL HISTORY

The plaintiff, Iezhja Hartsell, filed this action in the Circuit Court for Knox County, Tennessee on April 7, 1989. In the initial Complaint, plaintiff asserted claims of medical malpractice and battery against Dr. Richard O. Manning, certain nurses in attendance, and Fort Sanders Regional Medical Center. On January 4, 1991, plaintiff filed an Amended Complaint which alleged two (2) additional causes of action, outrageous conduct and violation of Tenn. Code Ann. § 39-4-206.

On January 25, 1991, defendants filed a Motion to Dismiss for failure to state a claim or cause of action upon which relief can be granted relative to plaintiff's claim based on outrageous conduct and the alleged violation of Tenn. Code Ann. § 39-4-206. After considering the record and argument of counsel, on March 12, 1991 the Court granted defendants' Motion to Dismiss. On December 30, 1992, defendants filed a joint Motion for Partial Summary Judgment seeking dismissal of plaintiff's claim of battery. After considering the record and argument of counsel, on February 19, 1993 the Trial Court granted defendants' Motion for Partial Summary Judgment and dismissed plaintiff's remaining claim leaving only the claim of alleged medical malpractice to be tried by a jury.

The medical malpractice action came on for trial on March 2, 1993. However, the Trial Court effectively permitted plaintiff to try within the medical malpractice action, the issue of whether defendants, including Dr. Manning, obtained informed consent, i.e. committed battery, and said issue was tried within the recognized standard of acceptable professional practice applicable in 1983 for each health care provider. During the trial, plaintiff took a voluntary dismissal as to the nurses in attendance. At the close of plaintiff's proof, the Trial Court directed a verdict for defendant Hospital. The jury returned a unanimous verdict in favor of Dr. Manning, the sole remaining defendant.

Plaintiff timely filed a Notice of Appeal to the Court of Appeals of Tennessee for the Eastern Section. The Court of Appeals affirmed the Judgment of the Trial Court. Plaintiff's Application for Permission to Appeal to the Tennessee Supreme Court was denied.

B. STATEMENT OF THE FACTS

In March, 1983, Dr. Richard Manning was the mother, Lieza Hartsell's, treating physician. On May 27, 1983, Ms. Hartsell consulted Dr. Manning believing herself to be pregnant. Her pregnancy was medically confirmed by Dr. Manning and she came under his care for such pregnancy. (A.T. I, 68B). Ms. Hartsell, an admitted cocaine and marijuana user, was considered a very high risk patient and an ultrasound was obtained on June 13, 1983 to determine the baby's due date. (A.T. I, 68C). Ms. Hartsell missed several scheduled prenatal office visits and did not see Dr. Manning again until early September, 1983.

On September 27th, Dr. Manning both spoke with and examined Ms. Hartsell because of complaints of vaginal bleeding. (A.T. I, 68E-68H). An ultrasound was obtained to rule out placenta previa, a condition that causes hemorrhaging and blood loss to the uterus. (A.T. I, 68H, 68J). The ultrasound report did not substantiate placenta previa, but confirmed the fetus as 23-weeks gestational age and Ms. Hartsell was permitted to go home with instructions to call if she had further problems. (A.T. I, 68K, 68L).

The following morning, on September 28, 1983, Lieza Hartsell called Dr. Manning at his home at approximately 6:00 a.m. complaining of severe pain. Dr. Manning instructed her to go to the hospital where he would meet her. (A.T. I, 68L). Dr. Manning arrived first. He met Ms. Hartsell upon her arrival around 6:40 a.m. Upon admission and examination, Dr. Manning diagnosed her condition as abruptio placenta, a severe life threatening condition. He diagnosed the fetus as 23-weeks gestational age with no chance for survival. (A.T. I, 68M-68X). Abruptio placenta is when the afterbirth (placenta) shears off the uterine wall. (A.T. I, 68JJ). Dr. Manning's estimate of the gestational age of the fetus was based upon his examination and the ultrasounds of June 13 and September 17, 1983. Dr. Manning knew the child was going to be delivered and, in his medical judgment, could not survive due to extreme prematurity. (A.T. I, 68X-68TT). Because of this medical judgment and due to the fact that Ms. Hartsell was screaming with pain, intravenous Demerol was administered to Ms. Hartsell at 6:50 a.m. Prior to the infant's spontaneous delivery, Dr. Manning charted that

no heroic measures or neonatologist's presence were indicated because of the fetus' gestational age and its nonviability. (A.T. I, 68X-68Z).

Dr. Manning attended to Ms. Hartsell for approximately 45 minutes. He then left her bedside to go to the bathroom. At such time, Ms. Hartsell was being attended by Faye Goodman, a registered nurse at Fort Sanders Hospital with over 30 years obstetrical nursing experience. (A.T. I, 68P, 68Q, 68U). Ms. Hartsell spontaneously delivered her child at approximately 7:24 a.m. while Dr. Manning was in the bathroom. (A.T. I, 40). A Fort Sanders Hospital obstetrical nurse, Linda Hults, took the newborn to the delivery room and called for Michael Tinker, a Certified Registered Nurse Anesthetist. Mr. Tinker arrived immediately thereafter and inserted an oxygen tube and began breathing for the infant. (A.T. II, 78-79). The infant's one minute APGAR score was two; one for heart rate and one for respiratory effort. This was out of a total possible APGAR score of ten. Notwithstanding the fact that the infant was receiving 100 percent pure oxygen through the endotracheal tube, the infant's heart rate rose only to 50 and had, in fact, decreased to 40 when the breathing tube was removed around 7:30 a.m. (A.T. I, 68FF, A.T. II, 86-88 and 92-92A).

At 7:30 a.m., Dr. Manning entered the delivery room and was advised of the child's spontaneous delivery. After assessing the infant's condition and having determined that the child's heart rate had decreased from 50 to 40 after receiving 100 percent pure oxygen for several minutes (normal heart rate being in the range of 120 to 150), Dr. Manning directed CRNA Tinker to cease his resuscitation efforts based on his medical judgment and

belief that the infant was too premature to survive and regarding it as the humanitarian thing to do. (A.T. I, 68FF and 68HH). CRNA Tinker concurred with the appropriateness of Dr. Manning's directive, as did Nurse Hults, and Tinker removed the breathing tube. (A.T. II, 88A-90 and A.T. IV, 317G-317H). CRNA Tinker testified that had he regarded Dr. Manning's order as being wrong, he would not have performed the extubation and that it would have been within his standard of care not to follow the suggested treatment course. (A.T. I, 89-90).

Dr. Manning advised Ms. Hartsell before the infant was delivered that the child was too premature to survive. (A.T. I, 44). After delivery, Ms. Hartsell again was informed by Dr. Manning that the baby was much too premature to survive. Having been given this information, the mother did not make any treatment requests relative to the infant. (A.T. I, 45). Around 8:05 a.m., Ms. Hartsell signed a Special Hospital Permit Form consistent with the consensual treatment that Dr. Manning had given to her and her infant. (Fort Sanders Hospital Medical Records, Trial Exhibit 1).

After ordering that resuscitative efforts cease for the newborn, Dr. Manning returned to the care and treatment of Ms. Hartsell to monitor her for blood loss and the delivery of the placenta. (A.T. I, 68HH). During this time frame, the infant continued to be cared for and monitored by attending hospital nurses. (A.T. IV, 312-313). The infant continued to have a slow, irregular heart rate, but no respirations were observed. (A.T. I, IV 317I). Around 8:20 a.m., Nurse Latham noticed increased respiration and heart rate and an audible cry was noted. Dr. Manning was informed promptly and he immediately requested

that neonatologist, Steven Prinz, come from Children's Hospital. Dr. Prinz arrived around 8:40 a.m. and took over management of the infant who was transferred to Children's Hospital. (A.T. I, 68KK).

Plaintiff, Iezhja Hartsell, survived her extremely premature birth. She has only a partial, mild to moderate, hearing loss. (A.T. II, 149). At the time of the trial, she was a nine-year old elementary school student making straight "A's" in all of her academic classes and was regarded as a talented and gifted student by the school system (an accelerated program for students recognized as being more intelligent and motivated than average students). (A.T. I, 23). Plaintiff is able to hear and communicate with others through the use of hearing aids. Her direct examination testimony at trial demonstrated that she was a good speller and an avid reader. (A.T. I, 20-22).

Plaintiff's medical causation expert witness, on the issue of plaintiff's hearing loss, was Dr. Arthur Prensky. Dr. Prensky diagnosed her hearing loss as sensorineural due to a lack of oxygen and possibly to certain medications the child received upon her birth. (A.T. II, 139-141). However, Prensky conceded and testified on both direct and cross examination that there were periods of time before her birth which could have caused or contributed to this sensorineural hearing loss. (A.T. II, 153). Dr. Prensky also testified that Ms. Hartsell's abruptio placenta was a potential contributing factor for hypoxia (oxygen deprivation) to the fetus just preceding and shortly after birth. (A.T. II, 154). On cross examination, Dr. Prensky testified that he could not say whether or not the plaintiff would have had sensorineural hearing loss if the breathing tube had not been removed. (A.T. III, 198). In any

event, Dr. Prensky testified that plaintiff's hearing loss was in part correctable with hearing aids. (A.T. II, 50). This was confirmed by the testimony of plaintiff's audiologist expert, James Thelin, who testified that if the plaintiff uses hearing aids on a regular basis, her functional capabilities will improve and that her prognosis as far as articulation and language is excellent and very well 100 percent correctable. (A.T. III, 267B-267C). Dr. Thelin further conceded that when he spoke with plaintiff her conversational speech was fluent. (A.T. III, 267C).

Dr. Andrew Zimmerman, a board certified neurologist with special competence and specialization in pediatric or child neurology, testified on behalf of Dr. Manning that the plaintiff's sensorineural hearing loss was due to her very low birth weight and extreme prematurity, and that the plaintiff did not suffer any significant oxygen deprivation, either due to her abruptio placenta or the extubation. (A.T. IV, 324). Dr. Zimmerman also testified that it was his opinion that any oxygen deprivation that plaintiff may have experienced after the order for extubation did not result in any hearing loss. (A.T. IV, 325).

Dr. Manning, testifying on his own behalf, opined that he acted within the recognized standard of acceptable professional practice for an obstetrician practicing in Knoxville, Tennessee in September, 1983 in his diagnosis, care, and treatment of the plaintiff and her mother. He specifically testified that his medical judgment that a 23-week gestational age infant could not survive and should not receive extraordinary medical resuscitative effort, was within the standard of care at that time. (A.T. I, 68MM-68ZZ and A.T. II, 68AAA-68DDD).

Dr. Baha Sibai, head of the Obstetric unit at the University of Tennessee Medical Center in Memphis, testified as to the obstetrical standard of care for a physician in 1983 practicing in Knoxville, Tennessee and similar communities confronted with spontaneous premature delivery of a 23-week gestational age infant. Dr. Sibai testified that his obstetric unit has the largest maternal transfer system in the United States and the largest number of pre-term births delivered comparatively in the United States. (A.T. IV, 336C-336D). As head of the University of Tennessee Obstetric Service in Memphis, Dr. Sibai has both teaching responsibilities as well as active clinical (birthing) duties. (A.T. IV, 336E-336F). He testified that he had trained more than half of all obstetricians now practicing in Knoxville. (A.T. IV, 338). Plaintiff's counsel stipulated Dr. Sibai's eminent qualifications as an expert in the fields of obstetrics, gynecology, perinatology, and neonatology. (A.T. IV, 339A).

Dr. Sibai testified that Dr. Manning acted within the standard of care for an obstetrician practicing in Knoxville, Tennessee in 1983 relative to his diagnosis, treatment, and care of the plaintiff and her mother. (A.T. IV, 341-342). He specifically testified that in 1983 it was very, very difficult for premature infants born below 26-weeks gestational age to survive outside the womb and that premature infants estimated at a gestational age of 23-weeks were considered nonviable for all practical purposes, and that the standard of care for an obstetrician for such a premature infant in 1983 was to inform the mother that the baby had no chance for survival and not do anything relative to resuscitative efforts on behalf of the infant. (A.T. IV, 343-346). Dr. Sibai concurred with Dr.

Manning's medical judgment that the plaintiff was non-viable based on her estimated gestational age of 23-weeks, and testified that Dr. Manning acted within the recognized standard of acceptable professional practice for an obstetrician in 1983 in ordering the cessation of resuscitative efforts. (A.T. IV, 348-349). Dr. Sibai further opined, with reasonable medical certainty, that he did not believe the plaintiff had sustained any hypoxic injury as a result of Dr. Manning's order to extubate the infant. (A.T. IV, 349-353). Both Dr. Manning and Dr. Sibai assessed the plaintiff's survival at 23-weeks gestational age and subsequent medical course as miraculous. (A.T. I, 68KK and A.T. IV, 358A).

The Respondent submits that the Statement of the Case in Hartsell's Petition for Writ of Certiorari, primarily at pages 5-6, and the appendix at pages 18 and 25-29, includes alleged facts which are outside the record. The alleged details of Iezhja Hartsell's condition upon her admission to Children's Hospital and her examination by Dr. Prinz are not matters of proof in this case.

SUMMARY OF ARGUMENT

The claims raised by Petitioner in this action are based upon state law which is supported by long-established legal doctrine, and over which this Court lacks subject matter jurisdiction. Further, Petitioner has failed to properly raise and preserve the constitutional issues posed, thus these issues have been waived. There are no special and important reasons which would warrant review by the Supreme Court.

The Courts below did not violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution by limiting plaintiff's trial to her claim of medical malpractice.

The ruling of the Tennessee Court of Appeals should stand. The Petition for Writ of Certiorari to the United States Supreme Court should be denied.

ARGUMENT

I. The United States Supreme Court lacks subject matter jurisdiction over the Petition because this case involved issues of state law which are not of a magnitude sufficient to warrant review by this Court.

Rule 10 of the Rules of the Supreme Court of the United States provides that, "a petition for a writ of certiorari will be granted only for compelling reasons." The text of this rule sets forth specific reasons which satisfy this standard that includes conflicts between decisions of various circuit courts of appeal or decisions by state or federal courts concerning significant issues of federal law. This action fails to meet the criteria set forth in Rule 10. This action involves issues of state law only which are supported by established legal doctrines, and which are not of a magnitude sufficient to warrant review by the Supreme Court of the United States.

In her Complaint and Amended Complaint, plaintiff asserted four (4) alternative theories of liability against the defendants: 1) medical malpractice; 2) common law battery; 3) outrageous conduct; and 4) a statutory claim

based on one of Tennessee's abortion regulations. In response to defendants' Motion for Partial Summary Judgment, the Trial Court dismissed plaintiff's battery claim. In response to defendants' Motion to Dismiss, the Trial Court dismissed plaintiff's claims of outrageous conduct and an alleged violation of one of Tennessee's abortion regulations for failure to state a claim or cause of action upon which relief can be granted. Plaintiff's remaining medical malpractice claim was heard before a jury which returned a defense verdict.

The Trial Court properly evaluated the record and found that plaintiff had not come forward with evidence to create an issue of fact on her battery claim and dismissed this claim. The issues involved were exclusively those of the application of state common law and state procedure to the facts of the case. Partial summary judgment was properly allowed in accordance with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Likewise, the Trial Court properly evaluated the record and found that plaintiff could prove no set of facts which would entitle her to relief on her claims of outrageous conduct and the alleged violation of a Tennessee abortion regulation and dismissed these claims. Again the issues involved were exclusively those of the application of state statutory and common law and state procedure to the facts of the case. The Motion to Dismiss was properly granted in accordance with *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The plaintiff had a fair and adequate opportunity for consideration of these issues by the Courts below.

This case does not involve conflicts with other Courts of appeals or conflicts between state courts regarding a

federal question, does not involve a departure from the usual course of judicial proceedings, and does not involve an important question of federal law which should be settled by this Court. The Petition does not raise any of the criteria of Rule 10, and none of those criteria are met by the facts and circumstances of this case. Accordingly, this respondent respectfully submits that the Petition should be denied.

I(A). The Petition should be denied because petitioner failed to properly raise and/or preserve any issue of federal law in the Tennessee Courts.

Petitioner did not raise the constitutional claims asserted in her Petition for Writ of Certiorari in the Tennessee Courts and accordingly, these claims are waived. Consequently, this Court lacks subject matter jurisdiction relative to this Petition. *See*, 28 U.S.C. § 1257; *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

Following a defense verdict in the Trial Court, the plaintiff filed an appeal with the Tennessee Court of Appeals. The issues presented to that Court in plaintiff's brief were as follows:

I. The Trial Court erred in taking away the minor plaintiff's statutory and common law rights by limiting plaintiff's causes of action to medical malpractice.

I(A). The Trial Court erred in taking away the minor plaintiff's common law right to be free from a harmful or offensive touching.

I(B). The Trial Court erred in taking away the minor plaintiff's statutory right to medical care to preserve her life and health.

I(C). The Trial Court erred in taking away the minor plaintiff's right to have defendants' actions measured by our common standards of decency under the theory of outrageous conduct.

II. Even if the Trial Court did not err in limiting the minor plaintiff's causes of action to medical malpractice, it erred in its instructions and evidentiary rulings for the one cause of action it did allow.

II(A). The Trial Court erred in failing to instruct the jury on a physician's duty not to abandon his patient.

II(B). The Trial Court erred in excluding proof that defendants did nothing for plaintiff until she "did not stop gasping at the end of five minutes" and further that defendants discontinued life support for her when she "had a heart rate in excess of 100."

II(C). The Trial Court erred in excluding any proof related to defendant hospital's advertisement that in 1924 it kept a two pound, fourteen ounce premature baby alive and that she survived to be a healthy adult.

II(D). The Trial Court erred in excluding proof of AMA ethical rulings when the defendant had contractually agreed to strictly abide by those rulings.

III. The Trial Court erred in directing a verdict for defendant hospital when there was material evidence to support a verdict for plaintiff.

The issues raised by plaintiff in her application for permission to appeal to the Tennessee Supreme Court were

phrased differently, but were essentially the same as above. (App. 1).

The only time that the United States Constitution was mentioned by plaintiff in the courts below was a claim, made in passing, that the state court's interpretation that a Tennessee abortion regulation did not apply to premature infants not born as a result of a failed abortion, made that statute unconstitutional.

The United States Constitution does not compel the states to pass legislation regulating abortion. Further, if a state chooses to enact certain abortion regulations, the Constitution does not require that the state include in them civil remedies for premature infants not born as a result of a failed abortion. The scope, extent, and application of a state's tort law are solely matters of state law, and for state courts to interpret. *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 339 (1979). While the United States Constitution imposes some limits and restrictions on the creation of state tort laws, it imposes no requirements relative to what the states must offer its citizens in the area of civil torts. The United States Constitution does not compel the states to offer common law remedies for private causes of action, and specifically the Fourteenth Amendment does not compel any particular form or elements for civil remedies made available by state regulation. *See, Martinez v. State of California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Ferri, supra.*

The mere fact that Petitioner mentioned the United States Constitution in her brief to the Tennessee Court of Appeals does not preserve this issue for review by the Supreme Court of the United States. Rule 10 of the United

States Supreme Court Rules states that certiorari will be granted relative to important questions of federal law "decided by" the lower courts. *See,* United States Supreme Court Rule 10(c). The Tennessee Courts did not decide any important questions of Federal law. Specifically, the Tennessee Court of Appeals did not address the constitutionality of Tenn. Code Ann. § 39-15-206 in its opinion. When,

> the highest state court has failed to pass on a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary.

Street, supra at 1360; See e.g. *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945); *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 25 S.Ct. 200, 49 L.Ed. 413 (1905). Petitioner has not identified any question of federal law, important or otherwise, actually "decided by" the Tennessee Court of Appeals. This respondent respectfully submits that this was not done because the Tennessee Courts and specifically the Tennessee Court of Appeals did not decide any question of federal law in this case.

Because the plaintiff has only presented and argued questions of state law in the courts below, and because the Tennessee Court of Appeals did not decide any federal question in ruling on this case, Petitioner has not preserved her alleged constitutional claims and thus these issues are waived. *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391 (1936). Accordingly, this respondent respectfully submits that the Petition should be denied.

II. The decision by the Tennessee Courts to disallow plaintiff from proceeding to trial on her claim of common law battery, or her statutory claim based on one of Tennessee's abortion regulations does not violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

The Petitioner does not cite any decision of this Court, any decision of any Federal Court, or any legal authority whatsoever to support plaintiff's assertion that the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution compel the Tennessee Courts to grant plaintiff a jury trial on either her claim of common law battery, outrageous conduct, or her statutory claim based on one of Tennessee's abortion regulations.

II(A). The Tennessee Court's interpretation of the application of one of its abortion regulations to the facts of this case does not violate the equal protection clause of the Fourteenth Amendment.

The equal protection clause of the Fourteenth Amendment of the United States Constitution is in essence a directive that all persons similarly situated should be treated alike. *See, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3253-54, 87 L.Ed.2d 313 (1985). The equal protection clause does not require that individuals who are differently situated be treated equally, nor does it disallow similar treatment of dissimilarly situated individuals.

Plaintiff maintains that the equal protection clause requires the Tennessee Courts to extend the application of one of its abortion regulations to premature infants born to women not seeking an abortion. Plaintiff asserts that Tenn. Code Ann. § 39-15-206 somehow grants more rights to aborted fetuses than to prematurely born infants. However, Tenn. Code Ann. § 39-15-206(c) simply provides that if, during the course of an abortion, an infant is born alive, the individuals in attendance must provide "all reasonable and necessary care reasonable under the circumstances in the general vicinity in which they practice." The standard set forth in this statute is identical to the standard applied in a Tennessee medical malpractice case, and the standard that was applied to plaintiff's case. *See*, Tenn. Code Ann. § 29-26-115.

In Tennessee in order to make out a claim for medical malpractice, the individual (including a premature infant) must show that the care they received was below the acceptable standard of professional practice in their community. *See*, Tenn. Code Ann. § 29-26-115. In Tennessee an infant born alive during the course of an abortion is entitled to that same degree of medical care from those attending, specifically "all reasonable and necessary care under the circumstances in the general vicinity in which they practice." *See*, Tenn. Code Ann. § 39-15-206(c). The standard of care afforded to aborted fetuses born alive and the standard of care afforded the premature infants are identical, and this is the standard of care that was applied to plaintiff's case. Accordingly, the statute in question and the Tennessee courts' interpretation of the statute provided similar treatment to dissimilarly situated individuals and in no way violates the equal protection

clause of the Fourteenth Amendment to the United States Constitution.

Above and beyond the fact that Tenn. Code Ann. § 39-15-206(c) does not violate the equal protection clause, the validity of this abortion regulation cannot be tested in the absence of facts and of parties actually affected by those regulations. *See, Gorieb v. Fox*, 274 U.S. 603, 77 S.Ct. 675, 71 L.Ed. 1228 (1927). Plaintiff was in no way affected by this Tennessee abortion regulation. In holding that Tenn. Code Ann. § 39-4-206 was inapplicable to this case, the Tennessee Court of Appeals stated:

> The clear language of the Statute shows that it was designed to protect babies born during an abortion, not all babies born prematurely. This is not to say that premature babies are not to be protected. But this Section does not give babies born prematurely a special cause of action beyond that which they are already assured under the law of medical malpractice. (p. 6).

Decisions made relative to plaintiff's care upon birth were not governed or regulated by this Tennessee abortion regulation. At no stage of this case has plaintiff contended that she was born as the result of a failed abortion, and the record is uncontroverted that the case before this Court has never had anything to do with an abortion. Accordingly, this Court cannot test the validity of this Tennessee abortion regulation when it was never applied to the plaintiff or the facts of this case.

II(B). The Tennessee Courts did not violate the due process clause of the Fourteenth Amendment when it limited plaintiff's trial to a claim of medical malpractice.

The plaintiff contends that in violation of her due process rights, the Trial Court limited her cause of action to medical malpractice. Plaintiff asserts that her claims for common law battery and an alleged statutory violation were withheld by "judicial slight of hand." (p. 13 of Petition for Writ of Certiorari.) This simply is not true.

The due process clause of the Fourteenth Amendment to the Constitution of the United States grants to the person affected the right "to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense." *Black's Law Dictionary*, 4th Ed. Rev. (1968). This right includes the right to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. Daniel Webster defined due process to mean, "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 581, 4 L.Ed. 629 (1819). Relative to plaintiff's battery claim, both the Trial Court and the Tennessee Court of Appeals concluded that plaintiff's mother gave informed consent for Dr. Manning and the hospital to treat her newborn infant and properly dismissed the battery claim. Relative to the alleged statutory violation of one of Tennessee's abortion regulations, the Trial Court and the Tennessee Court of Appeals properly concluded that inasmuch as plaintiff does not contend that she was

born as a result of a failed abortion the statute does not apply. Contrary to plaintiff's contention that she was denied a hearing on her claims of common law battery and an alleged statutory violation, both the Trial Court and the Tennessee Court of Appeals fully considered these claims and found them to be without merit.

Plaintiff received a trial on her claims, a right available to all citizens; she has not lost "her right to civil remedies guaranteed to every other citizen." (p. 13 of Petition for Writ of Certiorari). The Tennessee Courts granted plaintiff the right to a jury trial. The plaintiff lost. This fully satisfies the due process requirements of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The respondent respectfully submits that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The petitioner has had this record properly reviewed both at the trial and appellate Court levels. This respondent respectfully submits that the decisions of these Courts are proper and that the Petition for Writ of Certiorari should be denied.

Plaintiff's claims were carefully and fully considered in the lower courts. Furthermore, because Petitioner has not properly raised or preserved for appeal the asserted issue that certain constitutional protections were violated, and has not presented this Court with a federal question for review as required to invoke the jurisdiction of this Court, this appeal is frivolous and appears to have been

advanced solely for the purposes of harassment or delay. Accordingly, this respondent respectfully requests this Court to not only deny the Petition for Writ of Certiorari, but also to consider the appropriateness of an award of damages to the respondents pursuant to Rule 42.2 of the United States Supreme Court Rules.

Respectfully submitted,

RICHARD O. MANNING, M.D.

R. FRANKLIN NORTON
GARY G. SPANGLER
LYNN C. PETERSON
Attorneys for Respondent, Richard O. Manning.

Of Counsel:

NORTON AND LUHN, P.C.
P.O. Box 2467
550 Main Avenue
Suite 900
Knoxville, Tennessee 37901-2467
(423) 971-4600

APPENDIX

QUESTIONS PRESENTED FOR REVIEW IN IEZHJA HARTSELL'S APPLICATION FOR PERMISSION TO APPEAL TO THE TENNESSEE SUPREME COURT

I. Did the Court of Appeals err in limiting Appellant's causes of action to medical malpractice by holding inapplicable every law, statute, theory, jury instruction or rule which would prevent the removal of life support from a minor infant?

II. Did the Court of Appeals err in approving a directed verdict in favor of Defendant Hospital when there was material evidence in the record which would support a verdict for the Plaintiff?